

MILITARY LAW REVIEW VOL. 57

Perspective

**THE MANUAL FOR COURTS-MARTIAL—1984
THE GERMAN MILITARY LEGAL SYSTEM**

Articles

**THE CONSTITUTION, THE UNITED STATES COURT OF
MILITARY APPEALS AND THE FUTURE**

**MY LAI AND VIETNAM: NORMS, MYTHS
AND LEADER RESPONSIBILITY**

Recent Developments

Book Reviews

e
a
i
a
l

p
T
a
G

v
d
T
v
a
sh
1
o

sh
G
ti
sc

vi
V

(1

MILITARY LAW REVIEW

The *Military Law Review* provides a forum for those interested in military law to share the product of their experience and research. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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The first of these is the fact that the law is not a static body of rules, but a living organism which grows and changes with the needs of the community. It is not a mere collection of arbitrary commands, but a system of principles which guide the conduct of the individual and the action of the government.

The second of these is the fact that the law is not a mere technical science, but a moral science. It is not enough to know the letter of the law, but one must also understand the spirit in which it was enacted, and the principles which it embodies.

The third of these is the fact that the law is not a mere instrument of power, but a means of justice. It is not enough to enforce the law, but one must also strive to make it just. The law should be a shield for the weak and a sword for the strong, but it should also be a balance scale, weighing the rights and wrongs of all.

The fourth of these is the fact that the law is not a mere system of rules, but a system of principles. It is not enough to know the rules, but one must also understand the principles which underlie them. The law should be a guide to the conduct of the individual and the action of the government, but it should also be a source of inspiration and guidance.

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HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, Summer 1972

MILITARY LAW REVIEW—VOL. 57

Page

Perspective:

The Manual for Courts-Martial—1984 Major General Kenneth J. Hodson	1
The German Military Legal System Dr. Friedhelm Krueger-Sprengel	17

Articles:

The Constitution, the United States Court of Military Appeals and the Future Captain John T. Willis	27
My Lai and Vietnam: Norms, Myths and Leader Responsibility Captain Jordan J. Paust	99

Recent Developments:

The Law of Speedy Trial: <i>United States v. Burton</i> , 21 U.S.C.M.A. 112, 44 C.M.R. 166; <i>United States</i> <i>v. Hubbard</i> , 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971)	189
Environmental Responsibilities for the Military: <i>Citizens for Reid State Park v. Laird</i> , USDC Maine, 21 January 1972	203

Book Reviews	217
--------------------	-----

Books Received	223
----------------------	-----

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C. 20315

INDEXED
71-100-31

MILITARY LAW REVIEW--VOL. 31

1	Transmittal
7	The Manual for Courts-Martial--1951 Major General Kenneth J. Hodson
17	The Uniform Military Legal System Dr. Frederick K. Koenig
27	Attorneys The Constitution, the United States Court of Military Appeals and the Service Captain John T. Wynn
39	My Law and Vietnam: Norms, Myths and Legal Responsibility Captain Richard J. Fenn
189	Recent Developments The Law of Speed Trials: United States v. Burton 31 U.S.C.M.A. 118, 44 C.M.R. 168; United States v. Burton, 31 U.S.C.M.A. 181, 44 C.M.R. 168 (1971)
205	Environmental Responsibilities for the Military Comments for World Bank & World Bank March 21 January 1972
217	Book Reviews
229	Book Reviews

PERSPECTIVE

THE MANUAL FOR COURTS-MARTIAL—1984*

Major General Kenneth J. Hodson**

It is a great pleasure for me to have this opportunity to talk to you. When I started to make notes for my remarks, I planned to give you the distillation of my thirty years of experience in the administration of military justice, tempered somewhat by the observations of the sages of the law, including some critics of the system of military justice, both military and civilian, lawyer and nonlawyer. During my first ten years in judge advocate work, I thought I knew all the answers, knew exactly what was right in every case. During my second ten years, I developed a few doubts in certain areas. During my third decade of service I discovered that I knew less and less and I had a great many doubts. Now that I have retired and have entered my fourth decade, I have doubts about almost everything.

We've had a lot of observations about the system of military justice from various people. Former Justice Tom C. Clark, speaking for the United States Supreme Court in *Kinsella v. Krueger* in 1956, made this comment about our military justice system:

In addition to the fundamentals of due process, it includes protections which this court has not required a state to provide and some procedures which would compare favorably with the most advanced criminal codes.¹

Of course, we recognize that this comment was made prior to such landmark decisions of the Court as *Gideon*,² *Escobedo*,³ *Mapp*,⁴ and *Miranda*.⁵ In 1960, in the James Madison Lecture at the New York University Law Center, then Chief Justice Warren commented favorably upon the Uniform Code of Military Justice, saying, in part:

The Code represents a diligent effort by Congress to insure that military justice is administered in accord with the demands of due process. Attesting to its success is the fact that since 1951 the

*This article was adapted from the first Kenneth J. Hodson Criminal Law Lecture at The Judge Advocate General's School on 12 April 1972. The views expressed are those of the author and do not necessarily represent the views of any governmental agency.

**Chief Judge, United States Army Court of Military Review.

¹ *Kinsella v. Krueger*, 351 U.S. 470, 478 (1956).

² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

57 MILITARY LAW REVIEW

number of habeas corpus petitions alleging a lack of fairness in courts-martial has been quite insubstantial. Moreover, I know of no case since the adoption of the Code in which a civil court has issued the writ on the basis of such a claim. This development is undoubtedly due in good part to the supervision of military justice by the Court of Military Appeals.⁶

To the contrary, however, is the comment of Justice Douglas in the *O'Callahan* case in 1969:

[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protections of individual rights, while a military trial is marked by the age old manifest destiny of retributive justice.⁷

There are also many comments by persons other than Supreme Court Justices. In a recent issue of the *Student Lawyer Journal*, a young woman law student concluded:

. . . that injustice does indeed occur in military courts and that the maintenance of military discipline through a commander's exercise of judicial discretion is responsible for that injustice.⁸

Senator Birch Bayh of Indiana, in introducing legislation which would make major changes in the Uniform Code of Military Justice, stated on the floor of the Senate on March 8, 1971:

The main thrust of this bill is an attempt to eliminate completely all danger of command influence, the possibility—or even the appearance—that the commanding officer of an accused man could affect the outcome of his court-martial. . . . In addition to the danger presented by command influence, the military justice system denies a defendant other rights fundamental to a free society.⁹

Subsequently, in a by-line article in *Parade*, the weekend magazine, Senator Bayh was even more harsh:

It is a shameful fact that this nation, which prides itself on offering 'liberty and justice for all,' fails to provide a first-rate system of justice for the very citizens it calls upon to defend those principles. *More than 3 million Americans now under arms are being denied rights fundamental to all members of a free society.*" (Emphasis in original)

⁶ Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 188, 189 (1962).

⁷ *O'Callahan v. Parker*, 395 U.S. 258 (1969).

⁸ 17 STUDENT LAWYER JOURNAL 12, 15 (March 1972).

⁹ 117 CONG. REC. S 2551 (March 8, 1971).

¹⁰ PARADE (1971).

Charles Morgan, Jr., of the American Civil Liberties Union would agree. He is quoted as saying, "The Uniform Code of Military Justice is uniform, is a code and is military—and therefore has nothing to do with justice."¹¹

This is a suprising commentary, coming so soon after President Johnson's commendatory remarks when he signed the Military Justice Act of 1968:

The man who dons the uniform of his country today does not discard his right to fair treatment under law. . . . We have always prided ourselves on giving our men and women in uniform excellent medical service, superb training, the best equipment. Now, with this bill, we are going to give them first class legal service as well.

Within the military, we likewise find conflicting views of military justice. Caesar is credited with saying, "Arms and the law cannot flourish together." One of our present day military critics, General Howze, a distinguished Army officer who is now retired, expresses views similar to those of Caesar:

The effect of a weakened system of military justice has been apparent for some time. Now it is simply getting worse, due to the turbulence which is shaking our society and, in turn, inevitably affecting military discipline. The requirements of military law are now so ponderous and obtuse that a unit commander cannot possibly have the time or the means to apply the system. . . ."

On the other hand, some of our younger commanders disagree with General Howze:

What it all boils down to is that military command is more difficult today because our society is more heavily stressing freedoms and rights. Leaders unwilling or unable to adjust to this trend will fail. Commanders who resort to military justice as a substitute for their own inadequacies are barking up the wrong tree. . . . We cannot afford the smoke screen of 'easy' justice behind which poor leadership has ever flourished."

About a year ago, the Chief of Staff, General Westmoreland, became so concerned by the criticism of his subordinate commanders about the inadequacies of military justice that he appointed General Matheson to conduct a survey of the system. General Matheson found that the system was a reasonably good one and was working well, but that the small unit commanders

¹¹ *Justice on Trial*, NEWSWEEK (March 8, 1971).

¹² Howze, *Military Discipline and National Security*, ARMY MAGAZINE (January 1971).

¹³ Graf, *Only a Leader Can Command a Company*, ARMY MAGAZINE (November 1971).

57 MILITARY LAW REVIEW

and the senior noncommissioned officers were grossly ignorant of how its procedures were to be applied.

In my own view this lack of knowledge of the commander and the NCO came about almost entirely because of the way we fought the war in Vietnam. Many, if not most, of our small unit commanders were two-year-tour officers who came and went before they could learn anything about the system. The short tour of a commander in Vietnam itself, where an officer rarely remained in command of a company or a battalion longer than six months, was, obviously, an inadequate time to learn what a commander's responsibilities were in the administration of military justice. So, although it is advisable to try to educate commanders in the basics of military justice at this time, I feel that our problems, the ignorant commander and the ignorant NCO, are, hopefully, disappearing. The better solution to this problem is to eliminate the rapid turnover of commanders. However, these commanders should be given standardized courses of military justice instruction in their basic and advanced courses, as well as at the Command and General Staff and Army War Colleges. (But see footnote 17). As soon as our NCO's begin to be NCO's with more than two years' experience, they will learn the system through on-the-job experience.

Throughout history there has been criticism of the justice system by the commanders of many Armies. For example, the Roman historians record Roman commanders who, from 40 B. C. to 400 A. D., urged a return to the good old fashioned discipline of their fathers. Mind you, this was in an Army where the commander had the power of summary execution over members of his command. A good example of the harshness of Roman discipline involves the execution of Titus Manlius by his father because Titus became involved in a duel with a member of the enemy forces.

Early in the Revolutionary War, General Washington urged the Continental Congress to raise the limit on flogging from 39 to 100 lashes, saying:

Another matter highly worthy of attention, is, that other Rules and Regulations may be adopted for the Government of the Army than those now in existence, otherwise the Army, but for the name, might as well be disbanded. For the most atrocious offences . . . a Man receives no more than 39 lashes; and these perhaps . . . are given in such a manner as to become rather a matter of sport than punishment . . . it is evident therefore that this punish-

ment is inadequate to many Crimes it is assigned to, as a proof of it, thirty and 40 Soldiers will desert at a time."

During the Civil War, General Lee lamented to his superiors:

I am thoroughly convinced of the inadequacy of the existing court-martial system. Punishment is not following the commission of offenses with that promptness and certainty which is requisite to the maintenance of discipline. . . . Much time is lost in forwarding the charges to higher headquarters before the offender can be ordered to trial; and an equal delay in the execution of the sentence is encountered because of the requirement that the findings be reviewed by the commander."

And, of course, we have the famous Ansell-Crowder disagreement following World War I. General Ansell contended that military justice should be liberalized so as to afford some protection of the rights of the individual soldier. General Crowder, then The Judge Advocate General, and representing the views of the commander, contended that military justice must continue to be a function of command.

Again, following World War II, we had wide-spread criticism of the system. For the Army, Congress enacted the 1948 Articles of War, which represented the best views of the commanders of what they thought they could live with, i.e., what concessions they could make to justice or due process and still maintain discipline. We all know that the Uniform Code of Military Justice followed about two years later; it represented a more liberal compromise between the commanders and the lawyers in establishing a system of justice.

When I started to prepare these remarks, the title of my talk was to be, "The Manual for Courts-Martial—2001." After reading Alvin Toffler's *Future Shock*, I decided that I could not predict what is going to be here in 2001. I was encouraged to shorten my sights by a recent address by the Commanding General of the Combat Developments Command, entitled "The Army of the Seventies." I concluded that if the command that is charged with planning for the Army of the future can't go any further than the Army of the 70's, which is now, it would be ridiculous for me to try to go out to 2001. So I settled for 1984.

The first question I asked myself was whether we will have an Army in 1984. I am sure we will, as I agree with the comment attributed to Plato that only the dead have seen their last war.

Most of the non-military critics of military justice, including

" 6 WRITINGS OF WASHINGTON 114. Extract from letter "To the President of Congress" dated September 24, 1776.

" W. ROBINSON, *JUSTICE IN GREY* (1941).

57 MILITARY LAW REVIEW

Senator Bayh, assert that military justice should be changed so that it will provide the same safeguards as an accused would enjoy in civilian courts. Thus, in predicting what military justice would and should be like in 1984, I tried to discover what civilian justice might be like on that date. The first thing I noted, of course, was that civilians were just as unhappy with the functioning of civilian justice as some of our commanders are with military justice. There has been widespread criticism of the so-called Warren Court for the decisions which, according to the critics, unfairly balanced the scales in favor of the law-breaker and against society. There are cries of "coddling criminals," of soft law enforcement, of legal technicalities which make it impossible for the policeman on the beat to know what he is supposed to do, of soft-hearted parole boards which return the criminals to the streets too soon.

That these lamentations seem to have some support is illustrated by our exploding crime rate, which, for years, has been growing faster than our population rate. In our last presidential election, one of President Nixon's campaign promises was that, if elected, he would get a new Attorney General, accusing then Attorney General Ramsay Clark of being soft on law breakers. With the retirement of Chief Justice Warren and the appointment of "strict constructionists" to the Supreme Court, some believe that the so-called revolution in criminal law brought about by such decisions as *Gideon*, *Miranda*, etc., has come to an end and that the new court will be tougher on criminals. Congress became concerned with the rise in the crime rate and enacted the Safe Streets Act, under which the Law Enforcement Assistance Administration has spent over a billion and a half dollars to bolster the forces of law and order. Yet there has been little change in the rising crime rate. In other words, all of these efforts, a new attorney general, the LEAA, all of the money spent, the retirement of Chief Justice Warren, and we still have about the same problem we had before.

Now those of us who have worked in criminal law are well aware that the rising crime rate was not the fault of the Warren Court. The widely criticized decisions of the Warren Court in the criminal law area merely raised personal rights to the level previously accorded only to property rights. The Warren Court is no more to blame for the crime rate than the Uniform Code of Military Justice is to blame for the media-touted breakdown of discipline in the Army during the Vietnam conflict. Both of those problems have other deeper causes.

Despite the problems of civilian law enforcement, I looked at

the civilian standards to see what our critics think we should measure up to. As you may know I'm very proud of the American Bar Association Standards for the Administration of Criminal Justice. I've worked on those standards for some seven or eight years and I think that they set the standards that we will probably find in most civilian courts in 1984. Many states fall far short of those standards at present. As a military lawyer, you will not find that those standards are very revolutionary. In fact, some of them are not as high—in terms of due process for the individual—as the standards we now find in military courts. There are several ABA standards, of course, where the military falls short, for example, the standards of trial by jury and the standards for sentencing. But, for the most part, we are already up to the level of the American Bar Association's Standards. As a matter of fact, when the 1969 Manual was being drafted, I encouraged the Army representative to incorporate as many of the Standards in the Manual as possible. So, moving military justice up to the Standards does not present much of a problem for us. Several of the revolutionary proposals in the Standards, that is, revolutionary from the viewpoint of the civilian bar, such as pretrial discovery, are old hat to us. Likewise, we have our Article 39(a) session, which is the equivalent of the omnibus hearing recommended by the Standards as a means of providing full discovery for the accused. We also have a liberal sentence appeal procedure similar to that recommended by the Standards, and but a few states have any provision for review of sentences.

So our system is good; it is more protective of the accused's rights than the systems of almost all states. But we can't stand pat because too many people believe that we don't have a good system. Pertinent is a remark attributed to Justice Holmes, "A system of justice must not only be good, but it must be seen to be good." If our system is not seen to be good, then we have to take some action, and the action in this case must be more than a Madison Avenue public relations campaign. We must think and plan ahead; if we don't propose acceptable improvements, we may get an unacceptable code of military justice thrust upon us by a well-intentioned but not too well informed Congress.

I now take up the Bayh Bill, which was very well studied, very well thought out by Senator Bayh and his staff. They consulted with members of my office, as well as with military lawyers of the other services. They also consulted with many of the more vocal civilian critics of military justice. I would agree with Senator Bayh that we do need a reasonably thorough overhaul of the

57 MILITARY LAW REVIEW

system and that we can't make the necessary improvements with just a few patches. It was mentioned earlier that I had a hand in getting the Military Justice Act of 1968 through Congress. You might ask why we didn't overhaul the system at that time. Well, politics is the art of the possible, and we obtained the best bill we could get at that time. It was so necessary for us to have counsel and judges on special courts, and to provide for trial by judge alone, we had to forego some of the other changes that were so desirable. A legislative item is like a boat; it will only hold so much. If you overload it, you may sink it and lose everything. If we are to have a carefully thought-out, substantial revision of the Code, we need committees in both the House and Senate that will give the necessary time to processing the legislation. But the Military Justice Act of 1968 was worth the effort, because without it, we would have had an extremely difficult time handling the sophisticated problems that came to us in the *My Lai* cases. The new Article 39(a) session, in part, was responsible for our ability to handle these cases effectively.

Senator Bayh's bill contains many provisions that are the same as recommendations I have made in the Code Committee Reports to Congress for 1969 and 1970, so obviously I don't disagree with them. I do disagree with his proposal for a court-martial command to handle military justice. This command would contain the prosecution, the defense, the judiciary, and the administrative support for a criminal justice system. My concept is a little simpler than that, but I think it accomplishes more. My concept would separate the prosecuting, judging, and defending functions, as far as practicable, and still have all of them operate within and contribute to the mission of the Army.

Under my concept, The Judge Advocate General, so far as his criminal justice functions are concerned, would be nearly like the Attorney General. He would not only be the chief legal advisor to the Army, but he would also be the Army's Chief Prosecutor. The Chief Judge of the Army Judiciary would be somewhat like the Chief Justice of the Supreme Court, independent within his own realm, and responsible for the proper functioning of the system at both the trial and appellate levels. The Defense Agency, which would include both trial and appellate defense counsel, would be a part of the Judiciary for administration only. This would remove them from command control. The staff judge advocates of each command in the field would resemble United States Attorneys. They would serve as house counsel for their commanders, and their principal function in the military

justice area would be to investigate and to prosecute. They would no longer have the present trifurcated mission of trying to prosecute with their right hand, trying to defend with their left hand, and trying to be judicial with their nose. The Defense Agency could be given the mission of legal assistance, if desired. Judiciary and Defense personnel would be assigned by The Judge Advocate General after coordinating with the Chief Judge and the Chief of the Defense Agency. The Chief Judge would be appointed by the President for a term of four years. All judges would be assigned to the Judiciary for terms of four years, as I say, after coordination with the Chief Judge. During this term, which could be extended, they could serve as trial or appellate judges, or both, depending on requirements.

The court structure would be somewhat as follows. I would eliminate the summary court-martial completely. As most commanders want to keep the summary court to give a man a short period of confinement, I would authorize five days' confinement under Article 15, but only if there is a right to refuse Article 15 punishment. The two remaining courts, the general and special courts-martial, would be renamed the Military District Court and the Military Magistrate's Court, respectively. The accused would have the option for jury trial in both courts. There is no constitutional requirement for a jury at the Magistrate's Court, but I think a jury is desirable. Service on a jury is part of the educational process of letting the people who are governed by a system participate in it and the only way laymen can participate in our system of justice is as members of a jury. While I am on the subject of juries, I would recommend that we retain our practice of not requiring a unanimous vote for conviction or acquittal. This practice not only is insulation against command influence, but also permits disposition of the case in one proceeding. The "hung jury" has no place in military law—it benefits neither the accused nor the Government.

The judicial system would be divided into districts established by the Chief Judge, after coordination with The Judge Advocate General. The districts would be independent of the command. For the first time within the Army, we could accomplish what Colonel Douglass and I worked unsuccessfully for in Vietnam, and that is to have courts which are located on the basis of population, geography, communications, and transportation, rather than on the basis of where the commander's hat happens to be hanging. When a court is established, it would start its docket and would be always open. Thus, there would be no detailing a judge for each case as we do now.

Juries would come from the units in the area. The judge would call on units serviced by him to submit a specified number of names of personnel of specified ranks. He might say one-fourth field grade, one-fourth company grade, one-fourth top three grade enlisted, one-fourth middle grade enlisted personnel. Grades 1, 2, and 3 should not be eligible for jury duty because they will be too inexperienced in the mores and requirements of the military community. When an accused wants a jury, names submitted by the units would be put in a jury wheel, and an appropriate number would be drawn. I favor retaining the three or more, or five or more, membership for the Magistrate and District Courts, respectively. The members of the jury would be required to fill out a questionnaire so that voir dire could be shortened. I would leave the voir dire pretty much to the judge, in accordance with the ABA Standards.

A case would get to court in the following fashion. Until a case is actually docketed by a court, it would be called a complaint, and not charges. The complaint would change to a charge only after it was docketed for trial by the court. Now this is a cosmetic change, just as the names Magistrate's Court and District Court are cosmetic. But a lot of our present problems stem from misunderstandings arising from the wrong names. Dismissing a complaint doesn't bother very many people. But dismissing a formal charge sounds highly irregular. Further, having a probable cause hearing on a complaint sounds better than a probable cause hearing on charges.

The accused should have the option of having a probable cause hearing before he could be tried by the District Court, but not with respect to cases being tried by the Magistrate's Court. The cases would get to the courts by being filed there by the staff judge advocate, the prosecutor, the district attorney. A complaint could be filed in a Magistrate's Court by specified commanders who would have as a requirement for exercising this function a trained legal clerk on their staff.

The prosecution would be permitted interlocutory appeals, but the appeals from the Magistrate's Court would go only to the district judge; the appeals from the District Court would go to a three-judge court designated by the Chief Judge.

Appellate review after conviction would be handled as follows: Magistrate's Court by petition only, and then the review would be by a district judge. The District Court case, if it results in a Magistrate's Court sentence, would go to a three-judge court for review. A District Court case with a District Court sentence would be handled substantially the same as our general court-

martial cases. Review of a case where the sentence is based entirely on guilty pleas, would be by petition only, and to the Court of Military Review. A contested case would be handled automatically as at present.

The trial judge would have the complete sentencing function except in capital cases. He should have the power to suspend and the power to impose deferred sentences. A deferred sentence is a sentence which is withheld for a prescribed period. If the accused straightens out, we'll say, in six months, then the judge issues an order which wipes out not only the sentence but the conviction. It purges the man's record completely. In other words, the ABA Standards on Sentencing Alternatives should be adopted, if practicable, with a view to rehabilitating the accused for service in the military.

The commander would become involved in the case after the trial only for clemency purposes. If he decided he would like to have the accused restored to duty, he could have him restored to duty. The Court of Military Review should be given the power to suspend the execution of sentences, including punitive discharges. This power reposes in The Judge Advocate General now and it takes a lot of paper work to get a case over there and the result is that in many cases the accused does not get the benefit of a suspension, simply because the paperwork is too great. Further, under my concept, The Judge Advocate General is the prosecutor. I would also give the Court of Military Review the power to substitute an administrative discharge for a punitive discharge.

The Court of Military Appeals would be created as an Article III court, with life tenure for its judges. I personally do not feel that we need an increase in the membership, but my mind is not closed on this point. However, I am certain that there is no need to increase the membership to nine, as proposed by Senator Bayh. We must remember that in a two-tiered appellate review system, the higher court does not need to review every case. It should limit its review to those cases which involve important principles of the law, leaving to the intermediate appellate court the day-to-day review of the bulk of the cases. If we were to apply Senator Bayh's proposal to the Supreme Court, it would need 10 to 20 times its present membership.

I would provide for a petition to the Supreme Court for a writ of certiorari. That would bring military justice under the umbrella of the Supreme Court, which is terribly important, for that should remove us from the stigma of being an executive, or what is worse, a political court. The Military District Court, the Court of Military Review, and the Court of Military Appeals

would also have authority in the area of habeas corpus, injunction, mandamus, and coram nobis with respect to the administration of military justice.

The rules of court, modes of proof, and rules of evidence would be prescribed by the Court of Military Appeals, after a majority vote of the United States Military Judicial Conference, which would be prescribed by law to consist of the judges of the Court of Military Appeals, the Chief Judge of each Court of Military Review, and The Judge Advocate General of each service. If there is a fear that the Conference would be dominated too much by the judges, I would accept a compromise by having only one Chief Judge of the Court of Military Review as a member. He could be selected by the Chief Judge of the Court of Military Appeals. The rules would become effective within a prescribed period after they have been laid before Congress. In this connection, I would strongly urge that many details of the administration of military justice which are now found in the Uniform Code of Military Justice, and which would be added to by the Bayh bill, be left to the rule-making power of the Court of Military Appeals. For example, the Bayh bill contains extensive provisions for discovery of evidence by the accused. I would prefer a basic statement of the right of the accused in this regard in the statute, leaving it to the Military Judicial Conference to work out the details for the rules.

Now, as to military offenses. Punishments for offenses would be prescribed in the Uniform Code of Military Justice, thus making it unnecessary for the President to become involved in this matter. I would abolish Article 134. I would substitute three classes of offenses under Article 92, providing a separate punishment for each class, depending on whether the order is issued by DOD, a Military Department, or a military commander. Thus, a set of military ordinances would be published by DOD to govern the people in the armed forces, and all would know what the law is. The assault offenses now in Article 134 could be moved to Article 128, which is where they belong. We would thus rid ourselves of "the Devil's Article." We don't really need it, and we can't defend our use of it in this modern world. It probably could not withstand a "vague and indefinite" attack in the Supreme Court.

Senator Bayh recognizes that the new responsibilities of his bill would make it necessary for us to be able to secure and retain high quality personnel, and he thus supports the incentive pay provisions of the Pirnie bill. However, he did not go into detail concerning a grade structure for the court-martial com-

mand proposed by him. If judge advocates are required to continue to compete with line officers for grades and spaces, including general officer grades and spaces,¹⁸ as well as for court facilities, we will be retaining a source of possible command influence. All you have to do is to look at some of the courtrooms and judges' chambers which our people are using today to realize that a judge is under some pressure to please the command if he wants to improve his lot. While I have no evidence that this type of command influence occurs in today's system, tomorrow's should remove even its possibility.

When the Uniform Code of Military Justice is revised, Congress should provide a personnel structure for military lawyers which will eliminate completely the possibility of command influence through control of grades and spaces. In addition to the Pirnie incentives, we need a separate promotion list, and we need a legislatively defined grade structure, including a general officer structure that would provide, say, one general officer for each 250 judge advocates, one-half of whom will be major generals and one-half brigadier generals. Congress should provide that The Judge Advocate General would serve in a grade one grade below that of the Chief of Staff, whatever that happens to be at the time. As I suggested earlier, the Chief Judge of the Judiciary would be appointed by the President for a four-year tour in the grade of major general. It is my view that all district and appellate judges while so serving, would serve in the grade of colonel. Legislation should also provide that the senior judge of each three-judge panel of the Court of Military Review, after serving satisfactorily in that position for at least five years, would be eligible to retire in the grade of brigadier general, under the same circumstances as apply to the Professors at West Point. The same provision should be made for the Chief of the Defense Service Agency.

There should be statutory provisions for spaces and grades for court support personnel, such as court administrators, bailiffs, clerks, and court reporters; similarly, grades and spaces should

¹⁸ Judge advocates have not fared well in the competition for general officer spaces, as the Army has never permitted them to have more than the five general officers spaces authorized by Congress when it enacted the 1948 Articles of War. This limitation has been maintained despite significantly increased responsibilities in military justice since 1948, as well as in such areas as procurement, litigation, tort claims, and international law; despite the poor retention rate of judge advocate officers; and despite the fact that the overall general officer strength of the Army increased from 358 in 1948 to 521 in 1972, including an increase from 26 to 64 in the general officer grades above major general.

be authorized for investigators for the lawyers in the Defense Service Agency. Unless provisions are made for adequate support personnel, we know that our judicial system will creak and groan, not because the system is bad, but because we don't have the properly trained administrative and para-professional personnel to help us make it work as it should. The importance of such personnel has been recognized by the civilian judiciary; for example, court administrators are being provided in Federal courts and many state courts. Anyone who has analyzed the delay in the disposition of court-martial cases today will usually find that much of the delay was caused by a fellow who was not trained to do his job, and when he did do his job after considerable delay, he did it wrong.¹⁷ So, in conclusion, amending the Code is not enough. We need to have Congress provide us with enough qualified personnel to administer the new system.

Senator Bayh didn't get into several areas which I think are critical to the overall operation of a military force in a war or in an overseas area. The first is the area of war crimes. How would we try war crimes under this new set-up? The punishment of war crimes is generally our obligation under the Geneva Conventions. I would suggest that we meet our obligation by providing that those crimes can be punished in the U.S. District Courts. Congress could also provide that they can be tried by a military commission appointed by a commander who is a lieutenant general or higher, to include the Secretary of the Army and the President. The second area involves the exercise of criminal

"For too many years, our senior commanders (battalion and higher) have been learning (mislearning is a better word) about military justice through scuttlebutt, rumor, hearsay, and "old war stories." On the other hand, we expect commanders to perform judicial or legal duties in connection with the administration of justice for which, in the time available, they can never be trained. In the Army's Legal Assistance Program, we encourage all personnel not to sign installment contracts, leases, etc., until they have conferred with the Legal Assistance Officer. Yet we expect some of the same people—company and battery commanders, for example—to be able to prefer court-martial charges involving such complex problems as the law of self-defense, insanity, mental responsibility, probable cause, defense of superior orders, entrapment, the distinction between premeditated murder and unpremeditated murder, larceny and wrongful appropriation, aggravated arson and plain arson, housebreaking and burglary. We even expect that they will investigate complex criminal cases and prefer charges without the benefit of the investigation performed by the trained agents of the Criminal Investigation Command. It is ridiculous to expect so much legal expertise from commanders who are saddled with so many other pressing duties. They should be required to file only a report of suspected criminal activity (a complaint), supported by statements of the principal witnesses, and trained professional and paraprofessional personnel should take over the case at that point.

jurisdiction over U.S. citizens who are stationed overseas in connection with the performance of official U.S. duties. I would provide for the trial of these persons for specified offenses by the U.S. District Courts. This would patch a hole in our jurisdiction that was created by the Supreme Court years ago.

I disagree with Senator Bayh that we need to establish a court-martial command. I would favor recognizing the staff judge advocate and the commander for what they are. They are the "Government." And it is in their interest to bring a case to trial if they can't handle it by nonjudicial punishment. But their authority only exists or extends to filing the case with the court and providing the prosecutor. If a serious offense is alleged, the accused is protected by the probable cause hearing. In minor cases, he is protected by having a trial before a judge, by being represented by lawyer counsel and by having a right to appeal. Those should be adequate protections from command influence. One reason for my preferring this system to that proposed by Senator Bayh is that, in the area of rehabilitation, we need the interest and help of the commander. In most cases, we will be trying to rehabilitate the soldier for further military service, and a suspended or deferred sentence returns the accused to his military community. If we separate the commander completely from all aspects of the administration of the military justice, we are losing a strong friend. There is no analogue for a commander in civilian criminal justice, and many correctional authorities have complained to me that their basic problem is in getting the civilian defendant re-accepted by the community from which he came. The commander provides us with a built-in probation and parole system, which, I believe, is far preferable to one which might be set up and operated by a court-martial command.

Prosecuting a criminal offense costs money. To apply some pressure to keep a commander from wanting to try every case, I would suggest that the commander be required to budget for the cash costs of the trial, such as travel costs, witness fees, laboratory tests, etc.

Someone has apparently convinced Senator Bayh that a judge advocate serving as a staff judge advocate is incompetent to serve as a prosecutor; whereas another judge advocate of the same grade, who is specifically designated as a prosecutor, but who will have no other duties, will be fairer. I don't see the distinction, and I think it is completely unnecessary to have that added structure, because, if my thirty years in the Army

has taught me anything, it has taught me that a commander is deeply interested in providing a law-abiding environment for his soldiers to live in; for nothing is more disruptive of morale and esprit than an environment—in barracks, on post—where soldier's safety and property are jeopardized by fellow soldiers. Commanders are likewise deeply interested in getting the most out of their soldiers, because, from time immemorial, this has been the true test of leadership.

The system of justice I propose is far less revolutionary than Senator Bayh's, and with the legislative provision for a proper personnel structure, would be far freer from command influence. Despite my criticism, I am not at war with Senator Bayh. I know that he is willing to listen to alternate proposals; that his proposals are not set in concrete. I am sure that we can work out a structure that will achieve the goals desired by Senator Bayh, while at the same time providing a viable system of justice that will aid the armed forces in accomplishing their mission.

As I have indicated, I agree with many of Senator Bayh's proposals, subject to my counter-proposal that procedural details should be left to the rule-making authority of the Court of Military Appeals. I want to go on record as indicating complete agreement with the following statement made by him when he introduced his proposed legislation.

Military commanders should not be concerned that the more equitable system of justice created by my proposed legislation will serve to undercut the discipline which we all recognize as necessary to an effective armed force. Indeed, experience has taught us that inequitable laws spawn disrespect for the law, and disrespect in turn eventually leads to disobedience.¹¹⁷

To put it another way, I have said many times that discipline is enhanced far more by the belief that a soldier can get fair treatment than it is by any system of iron-fisted military justice which appears to be unfair.

I am convinced that no responsible commander in today's Army would oppose any of the proposals that I have made. For, if a commander wants more authority in the area of military justice, it can only be for one reason, and that is that he wants to have the opportunity to influence the scales of justice when it suits him. And I am convinced that all responsible commanders would join with me in denying him that opportunity.

¹¹⁷ 117 CONG. REC. S 2556 (March 8, 1971).

THE GERMAN MILITARY LEGAL SYSTEM*

By Dr. Friedhelm Krueger-Sprengel**

I. HISTORICAL ASPECTS

The German military legal system dates back to the birth of the first German nation under the Saxon King, Otto I. In 917 A.D. he united the German tribes of the eastern part of the former Empire of Charles the Great. In those times of vassalage the whole social structure was based on military needs. Land and power were given to the vassals, dukes, and knights in exchange for life-long military duties. Thus the whole property of the followers served the interests of the King in maintaining military discipline.

In the late Middle Ages the mercenary system was developed in Europe. As mercenaries serve and fight solely for pay, the problem of keeping the necessary military discipline became the most important issue. The military value of armed forces depended now only on the methods of insuring and upholding discipline. The term "preussische Diziplin" (Prussian discipline) is popular since those times. This term connects military discipline with the rise of the Prussian Kingdom in the late Middle Ages.

The Prussian methods and articles of war go back to the 17th Century, about one hundred years before the first Articles of War were adopted by the Second Continental Congress on 30 June 1775 in America. These Articles were patterned largely after the British Army Articles, which on her part were derived from earlier European articles traceable to the Middle Ages and similar to the guidelines of Prussian military discipline.

But, the French Revolution gave an outstanding example that battle discipline can be upheld without relying merely on strong disciplinary law and cruel punishment. Because of this example, in Prussia, Austria and in other states of the German Federation, the Articles of War, which described roughly the special duties of the soldiers, and which were based on far-reaching and unlimited power of the military commander in matters of military justice, were basically changed. Constitutional rights of soldiers

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57 MILITARY LAW REVIEW

who served as citizens in the armed forces, now had to be considered for the first time in European history.

Since the middle of the 19th Century the German military legal system has undergone further basic changes. But in spite of these changes it remained within the general frame of the continental European law system. In deference to the Anglo-Saxon Legal System, and influenced by the example of the Code Napoleon, the continental military legal system always consisted of written military or penal codes defining military crimes and offenses and describing the competent courts and the procedure for trials. Besides this general aspect, the changes which have taken place during the last one hundred years in Germany were more frequent and substantial than changes or improvements of military systems in the United States or in other European countries.

After World War I, in the Weimar Republic, the Military Penal Code and the institution of Military Justice were abolished for the first time. Military Justice was reintroduced later and was even strengthened in the time shortly before and during World War II. The same happened to the Military Penal Code.

In 1954 the FRG signed the Paris Treaties. According to these treaties, Germany had rebuilt federal armed forces as a defense contribution to NATO. Therefore a new legal system had to be developed for the Bundeswehr. A strong and deep political discussion arose about the problems and the guidelines of new military legal system. Finally, the decision was made against the existence of a separate system of military justice and against the installation of military courts. This political decision was confirmed in an amendment to the new German Basic Law. Only two steps in the development of a new legal system seemed to be necessary: the drafting of a new Military Penal Code and a legal basis for the disciplinary power of the commanding officers. But, it was estimated, that the disciplinary power of the commanding officer should not be extended to any responsibility and influence over questions of civil crimes committed by soldiers.

One of the main differences between the German military legal system and the legal system of the United States armed forces lies in the fact that in the United States—and the same is true for most of the legal systems in other states—the legal system is based on the generally recognized need for a separate system of military justice. The German system which excludes military courts places criminal offenses of soldiers in the compe-

GERMAN MILITARY LAW

tence of civilian courts based on democratic ideas like "Staatsbuerger in Uniform" (soldier as citizen in uniform).¹

Under this general guideline the attempt was made in the years after 1954 to secure for soldiers the same political rights as any other citizen enjoys. It is obvious that such an attempt had to comprise the whole problem of the relationship between armed forces and the political structure of a democratic state.

II. MILITARY LAW

The term "military legal system" summarizes different aspects. In order to get a fair judgment of the efficiency of the system it is necessary to look at the whole body of the "legal life" within the federal armed forces. Military law is only one part of this life.

The following description of the guidelines of the German military legal system shall point out how the Federal Republic of Germany tries to solve the problems of military justice in a new and different way after an experience of two major wars within a period of only three decades.

A. THE SOLDIER'S RIGHTS AND DUTIES

1. *The Constitution (Basic Law).*

The Grundgesetz (Basic Law) of the FRG prohibits in Article 96a the creation of military courts in time of peace. The only exception to this general rule is made with respect to jurisdictions in territories outside the FRG and for servicemen on warships. But the size of the German Navy is so limited that a need has never been felt to organize a military court for crimes outside the territory of the FRG. Besides this, some other articles of the constitution have strongly influenced the military legal system.

Article 17 of the Basic Law states that every soldier has principally the same rights as any other citizen. His rights can only be limited by written law, which has to expressly mention the

¹ See, White Paper 1971/1972, The Security of the Federal Republic of Germany and the Development of the Armed Forces, Federal Minister of Defense, Bonn, Dec. 7, 1971:

"The concept of the citizen in uniform is a tie uniting the state, society, and the forces. It was under this conception that the activation of the Bundeswehr was initiated in 1955. Its purpose is two-fold: On the one hand, it is designed to fit the forces into the free and democratic constitutional order and subordinate them to political primacy; and on the other, to guarantee the basic rights of the individual which in the case of a soldier must not be restricted more than is necessary for the fulfillment of military duties."

57 MILITARY LAW REVIEW

right which is limited by the act. Beyond that, the basic right of the soldier cannot be restricted more than is necessary for the fulfillment of military duty. Limitations in the interests of military duty had to be established for the right to carry out political activities, to the freedom and free choice of profession, the free choice of living area and working place etc.

Other articles of the Basic Law are aimed to secure the political control of the legislative over the armed forces. Among them Article 45b which created the institution of the "Wehrbeauftragter" (military ombudsman) is worth mention. The Wehrbeauftragter has two major functions. He has to support the federal diet (Bundestag) in matters of control of the armed forces, and he has to act on his own in matters where he finds it is necessary to protect the basic rights within the Bundeswehr.

2. *Conscientious Objections.*

The fundamental right of any citizen to refuse to serve in the armed forces turned out to be of the highest political importance. Minority groups argue that the state has to give support for anti-war movements because these movements are as legal as the Bundeswehr.

Article 4, paragraph 3, of the Basic Law stipulates: "No one may be compelled, against his conscience, to render war service involving the use of arms." Based on this rule, the number of formally recognized conscientious objectors have increased from 7,500 in 1969 to 9,351 in 1970, and is still increasing.²

3. *The Soldiers' Act.*

A special code called "Soldatengesetz" (Soldiers' Act) describes the fundamental rights and duties of the soldier. The soldier's basic obligations are:

- To serve the Federal Republic of Germany faithfully,
- To uphold the liberal democratic order and,
- To defend the rights and the freedom of the German people valiantly.

These duties are subject to the formula of the soldier's oath, too. Among the duties laid down in the Soldiers' Act are obligations like:

- To carry out orders completely, conscientiously, and promptly
- To behave in a comradely manner

² *Id.* at 87.

GERMAN MILITARY LAW

—To be truthful in official reports and to maintain a secrecy in duty matters.

One of the most publicly discussed legal provisions is the section 15 of the Soldiers' Act. It guarantees the soldier's rights to carry out political activities during his free time. Naturally there are some restrictions. Political and propaganda materials, for example, cannot be distributed within barracks, common quarters or other parts of military installations. Furthermore, the wearing of uniforms during political meetings is prohibited. On the other hand, it is possible for an officer to criticize his defense minister or other political leaders for political reasons and using by political arguments.

Thus, equipped with considerable political rights, some soldiers have become elected members of the Bundestag and other representative bodies of the Laender and the Communities. At the moment six soldiers are members of the Bundestag.

Granting political rights to the soldier is a new achievement in the history of the German military legal system. Even in the times of the Weimar Republic, soldiers were not allowed to vote or to be elected. The armed forces were regarded as a political neutral body and an instrument in the hands of the government.

4. *Legality of Orders.*

In order to keep the soldiers' sphere of freedom as untouched as possible, section 10 of the Soldiers' Act states that orders can only be given when the subject of the order is related to official purposes and lies in the interests of service. This provision, too, several times gave reason for broad political discussions. The tendency of the young generation to wear their hair longer and to grow beards has posed the problem as to what extent this practice is compatible with military requirements. Can a soldier be ordered to cut his hair short? The fighting capability of an army does not necessarily depend on the length of the hair. From this point of view the individual should be free to make his own decision as to wearing his hair long or growing a beard. On the other hand, the necessity for safety in handling and operating modern military machinery means that certain limits have to be set. All these points were considered in ministerial directives.³ As a consequence of this directive every soldier who wears his hair too long, in a way that it covers his neck and shoulders, has to put on a hair net. Among others, these directives were mentioned in the latest annual report of the Wehr-

³ Ministerial Directives of February 5, 1971, and March 31, 1971.

57 MILITARY LAW REVIEW

beauftragter. The problem of upholding military discipline was the main subject of this report for 1971.⁴

5. *The Military Grievance Code.*

The Military Grievance Code states in what cases the soldier has the right to complain and describes what procedures have to be obeyed in such cases. Generally speaking, the soldiers can complain about unlawful orders and unlawful treatment by superiors. The complaint does not free the soldier from the obligation to carry out a certain order immediately.

B. ENFORCEMENT OF ORDERS AND DISCIPLINE

1. *Military Disciplinary Code.*

The description of the soldier's rights as a citizen, including his right to complain about treatment and orders, may give the impression that discipline is poor within the German military. There is no doubt that armed forces require a strong military discipline. The problem is to find out how far the interest of discipline should govern the life of the individual soldier. The military disciplinary code sets up the following rules to serve both the interests in maintaining discipline, and the freedom of the individual soldier. It is systematically constructed in a way to serve as an instrument in the hand of the commanding officer to enforce orders and strengthen discipline. These aims can legally be reached by granting certain awards for special performances and achievements and by punishing soldiers who have violated their duties.

For minor violations the commanding officer has the choice of disciplinary measures ranging from a warning up to confining a soldier for three weeks. For major violations the commanding officer has to bring the case before the disciplinary court. The disciplinary court acts with three judges and no jury; one judge is a civilian lawyer, and two judges are military men with at least one of them ranking as a staff officer. The competence of the disciplinary court is strictly limited to disciplinary violations and complaints of soldiers. The court can only impose disciplinary measures like:

⁴The directives of 5 February and 31 March 1971 have recently been canceled. A new directive of May 15, 1972 is based on experience gained according to which long hair increases the risk of accidents in the armed forces. It is reported that the wearing of hairnets has led to numerous difficulties in the soldier's everyday life. The directive furthermore states as a general rule that the serviceman's haircut must be such as to cover neither the ears nor the eyes.

GERMAN MILITARY LAW

- Forfeiture of pay
- Reduction in grade and,
- Discharge

But the defendant and the military disciplinary attorney, who represents the commanding officer in the trial, can appeal to the Federal Court of Administration which makes the final decision. The whole procedure and the judges are completely outside of the sphere of influence of the ministry of defense and the commanding officer. The disciplinary interest of the Federal Minister of Defense in all proceedings before the two military court divisions of the Federal Administrative Court, are represented by a special disciplinary attorney general for the armed forces. There are six field disciplinary courts with 26 judges in different divisions at which disciplinary actions and soldiers' grievances are adjudicated.

2. *Military Penal Code.*

The Wehrstrafgesetz (Military Penal Code) defines special military crimes which are related to the service within the armed forces as desertion, absence without permission, and disobedience. Thus, the FRG has created a Military Penal Code without corresponding military penal courts. If, therefore, a commanding officer recognizes a major violation of military or general penal law, he has to decide if he will give a report to the competent district attorney. After this report the trial is handled completely by the district attorney and the ordinary penal court. Even without a report from the commanding officer, the district attorney can investigate crimes committed by soldiers. But, such an investigation would be unusual.

In the last year a draft act to revise military disciplinary law has been placed before the Bundestag. This bill is a first step in a comprehensive reform of military disciplinary law. Pursuant to current legislation the soldier may be punished under penal law and disciplinary law. The bill provides substantial curtailment of the concurrency of penal and disciplinary sanction in the case of minor disciplinary offenses. The draft act tries to enhance legal protection of the soldier and to enlarge the authority of disciplinary superiors to maintain order and discipline at the same time.

C. *MILITARY JUSTICE IN TIMES OF ARMED CONFLICTS*

It seems to be obvious that the described legal military system cannot work satisfactorily during times of tension and war.

57 MILITARY LAW REVIEW

Therefore, practical steps have already been undertaken to establish military courts in times of tension and war. In the present plans the disciplinary court of the armed forces serves as cadre for the installation of military justice. The preparatory measures for the establishment of an enlarged military justice in times of armed conflict can be summarized in the following guidelines:

- Military courts will be established and will be competent for all violations of law, including disciplinary law of all German soldiers and for crimes of prisoners of war.
- There will be an acceleration of normal criminal procedures in military court.
- The military courts act with three judges, one a lawyer (Wehrgerichte). The accused has the right to appeal to military courts of appeal (Oberwehrgerichte) acting with five judges, three of them being lawyers.
- The military judges will have the legal status of combatants in international law. In order to assure their independence from the commanding officers they are attached to the Department of Justice.

The judges who are elected to become military judges in times of armed conflict number about 400, including a 100 per cent reserve, and are trained in special courses in order to become familiar with the special law in times of armed conflict including military law and the laws of war. Every two years they must attend a special one-week long course. In addition to that, they have steady contacts with the staff personnel of the division or equivalent military command to which they would be attached in case of war.

III. LEGAL ADVISERS AND TEACHERS OF LAW

A. LEGAL ADVISERS (*RECHTSBERATER*)

Legal advisers and teachers of law constitute an important part of the German military legal system. Legal advisers support commanders in the exercise of their command authority. This general task is rather similar to the advice and assistance given by the U.S. staff judge advocates. Lawyers are appointed as legal advisers to division and corps headquarters and equivalent commands. They act in the capacity of prosecutor in disciplinary court proceedings. The legal adviser furthermore has to inform the commanders about acute problems of military law and the laws of war.

The office of the legal adviser usually consists of two lawyers

GERMAN MILITARY LAW

and additional military aides. At present, 94 legal advisers are engaged in the administration of justice within the Bundeswehr. In times of peace the legal advisers have the status as non-combatant civil service officers. In times of armed conflict all legal advisers will get the status as soldiers and combatants.

B. TEACHERS OF LAW

At all military colleges, academies and schools of the Bundeswehr, one or two teachers instruct military officers in military and international law. Thus, all staff officers and—to a lower extent—all noncommissioned officers get a thorough knowledge of military law and law of war. A thorough knowledge of military law will help the commanding officer to use disciplinary law as an important means for upholding military discipline.

The law teachers themselves, the number of which amounts at present to 35, are trained lawyers with academic degrees. Before they are engaged as teachers within the military they usually have to serve as assistant legal advisers for at least one year.

C. LEGAL DIVISION IN THE MINISTRY OF DEFENSE

The judges of the disciplinary courts, the legal advisers and the teachers of law are controlled by the legal division within the Ministry of Defense. The legal division has a two-fold general task. It serves as *legal adviser* of the Ministry in all legal questions. It has to prepare internal legislation in matters of military law. Furthermore, it has to work out the contributions to legal drafts of other ministries from the military point of view. In the international area the legal division has to examine the efficiency of treaties and agreements before they are signed or ratified by the FRG with respect to military interests. The second major task of the legal division is the *control and instruction* of the legal advisers and the law teachers. This includes the issuance of directives and instructions as well as publishing material including booklets and films. The legal division consists of 9 sections with about 30 lawyers.

IV. APPRAISAL

Considering the present German military legal system as a whole, one could come to the conclusion that it might be too weak for fulfilling the needs of strong military discipline. Indeed, one has to admit that the system combines two extreme approaches. On the one hand one can point to a strong systematic organiza-

tion. It consists of legal teachers for all different types of educational institutions, legal advisers on all levels of the military hierarchy, and an independent system of military disciplinary justice. These three legal branches are sufficiently controlled by a legal division of the MOD and have a clearly expressed legal basis in the constitution and corresponding military codes.

On the other hand, a separate system of military justice, the strongest basis for the maintenance of military discipline, is missing in times of peace. But even in the United States the *O'Callahan* case increased the ambit of civilian jurisdiction over offenses committed by military personnel and the legislature is again looking toward reform of the military justice system.

In any case, the present German system is unique in the world and has been attacked in the literature of German military law. Additional weakness is given to the system by the fact that it constitutes an extreme reaction against illegal behavior and decisions during the last World War II. But the question of legality or illegality of war had to be answered principally by politicians and not by the organization and practice of military justice. For this reason the abolition of military justice had been attacked as an unjustified overreaction against the militarism in the past. This might have been true in 1957, but is no longer true today. In many modern industrial nations great concern for individual rights and liberties can be seen. This leads to an international trend to adapt military justice to civilian justice, putting the FRG at the front of this development. The experiences with the present legal system are good and therefore no intention exists to change it basically.

In spite of this general optimism, it has to be admitted that many problems remain to be solved. One of these major problems is that the German system is based on a clear-cut distinction between the status of peace and the status of armed international conflict. The possibility of *limited* armed conflict is not yet sufficiently considered. The planned establishment of military justice at the beginning of an armed conflict could have unwanted escalating effects. On the other hand without an effective instrument of military justice the deterrent capacity might be considerably diminished. Thus, one can hardly conclude that the German military legal system offers a perfect solution. But it can be considered as a system which keeps the limitations of the rights of the individual soldier to a minimum level.

ARTICLES

THE CONSTITUTION, THE UNITED STATES COURT OF MILITARY APPEALS AND THE FUTURE*

By Captain John T. Willis**

In Volume 55, Military Law Review, Captain Willis studied the creation and growth of the United States Court of Military Appeals. In this article he examines the Court's treatment of constitutional issues and its search for a constitutional philosophy. Finding disturbing evidence of judicial atrophy in recent years, the author suggests a variety of remedies to enhance the Court's reputation and its role as civilian watchdog over the military justice system.

I. INTRODUCTION

After outlining the origin and operation of the United States Court of Military Appeals in a previous article, I hinted that further examination of the decisions and structure of the Court would reveal a need for its revitalization.¹ For several reasons, the Court of Military Appeals decisions of constitutional significance provide an excellent springboard into a discussion of possible changes in the "Military Supreme Court." First, there has been a plethora of notes, comments, and articles on the constitutional rights of servicemen which generally compare individual rights in military and civilian criminal proceedings.² Second, the Court

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¹ Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 3993 (1972) [hereinafter cited as Willis].

² Collins, *Constitutional Rights of Military Personnel*, 1959 (unpublished thesis presented to The Judge Advocate General's School, Charlottesville, Virginia); Everett, *Military Justice Is to Justice . . .*, 12 A.F. JAG L. REV. 202 (1970); Finan & Vorbach, *The Court of Military Appeals and the Bill of Rights: A New Look*, 36 GEO. WASH. L. REV. 435 (1967); Kent, *Practical Benefits for the Accused—A Case Comparison of the U.S. Civilian and Military Systems of Justice*, 9 DUQUESNE L. REV. 186 (1970); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970) Nichols, *The Justice of Military Justice*, 12 WM. AND MARY L. REV. 482 (1971); Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. REV. 1240 (1968); Quinn, *The United States Court of Military Appeals and Individ-*

of Military Appeals has made its most dramatic contribution to military justice by embracing constitutional principles notwithstanding the history of separation between military and civilian jurisprudence.³ Lastly, the structural limitations and decision-making weaknesses of the Court are most visible and important in the area of constitutional law.

It is not the intent of this article to be another recital of the individual rights of servicemen vis-a-vis civilians. Rather, this article is primarily interested in focusing on the Court of Military Appeals as an institution in the belief that its strengthening will assure constitutional due process for those who serve their country in the armed services and will improve military justice in general.

II. THE COURT OF MILITARY APPEALS AND THE CONSTITUTION

A. THE DEVELOPMENT OF PHILOSOPHICAL DOCTRINE

The relationship between the Constitution and military justice as first perceived by the Court of Military Appeals was outlined by Judge Latimer in *United States v. Clay*:

Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do

ual Rights in the Military Service, 36 NOTRE DAME LAW, 491 (1960); Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970); Solf, *A Comparison of Safeguards in Civilian and Military Tribunals*, JUDGE ADVOCATE JOURNAL, March, 1957, at 5; *Is There Justice in the Armed Forces? A Panel Discussion*, 24 RECORD OF N.Y.C.B.A. 77 (1969); *Symposium on Military Law*, 22 CORNELL LAW FORUM 1 (1969). Several well publicized members of the civilian criminal bar with some experience in military justice have made similar comparisons and have given the military good marks. See Bellen, *The Revolution in Military Law*, 54 A.B.A.J. 1194 (1968); Belli, *I'm Tremendously Impressed*, SOLDIERS, July 1971, p. 38; Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455 (1971). For a "grass roots" perception of military justice see R. RIVKIN, *GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW* (1970). For a journalist's look at some recent celebrated military cases see R. SHERILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970).

³ *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). G. Davis, *A TREATISE OF THE MILITARY LAW OF THE UNITED STATES*, 15 (3d ed. rev. 1915); W. WINTHROP, *MILITARY LAW AND PRECEDENTS* (2nd ed. rev. 1896). Willis, at 42-51. See notes 5, 238 and text *infra*.

not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we cannot give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes. As we have stated in previous opinions, we believe Congress intended, insofar as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system.⁴

By declaring that the Constitution flowed through the Uniform Code of Military Justice to a defendant before a court-martial, the Court was only embracing the prevailing doctrine among military legal scholars and federal courts that the Constitution did not restrict congressional power to make rules for the governing of the armed services.⁵ Additionally, there was little reason for departure from the orthodox viewpoint as the newly enacted UCMJ,⁶ with the corresponding and complementary Manual provisions, offered parallel protections for individual rights. The UCMJ expressly provided a right to a speedy trial,⁷ the right to

⁴ 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

⁵ *Hiatt v. Brown*, 339 U.S. 103 (1950), rev'g 175 F. 2d 273 (5th Cir. 1949) (reversed on ground that appointment of non-lawyer law member was within discretion of convening authority; circuit court findings of due process denial in gross incompetence of counsel and law member, no pretrial investigation, insufficiency of evidence, and misconception of law by reviewing authorities held by Supreme Court as improper since the single test is jurisdiction); *Humphrey v. Smith*, 336 U.S. 695 (1949), rev'g *Smith v. Hiatt*, 170 F. 2d 61 (3rd Cir. 1948) (reversed on ground that requirement of fair and impartial pretrial investigation not indispensable to general court-martial jurisdiction and due process issue not raised absent unfairness at trial; Supreme Court noted that habeas corpus does not permit the review of "guilt or innocence of persons convicted by courts-martial"); *Wade v. Hunter*, 336 U.S. 684 (1949), aff'g 169 F. 2d 973 (10th Cir. 1948) (affirming withdrawal of charges from one court after evidence had been taken and the referral to another court as permissible by military necessity of advancing Army and not in violation of protection against double jeopardy) (*But see* dissent of Murphy, J. agreeing with district court and Army Board of Review that double jeopardy guarantee was violated). See Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 25 (1949) (optimistic and premature expectation of ability of federal courts to correct constitutional defects of courts-martial); Fratcher, *Review by the Civil Courts of Judgments of Federal Military Tribunals*, 10 OHIO STATE L. J. 271 (1949); Palsey, *The Federal Courts Look at the Courts-Martial*, 12 U. PITT. L. REV. 7 (1950); Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 MO. L. REV. 147 (1949); Hote, *Collateral Attack on Courts-Martial in the Federal Courts*, 57 YALE L. J. 483 (1948).

⁶ UNIFORM CODE OF MILITARY JUSTICE, codified at 10 U.S.C. §§ 801-940 (originally enacted as Act of May 5, 1950, ch. 169, sec. 1, arts. 1-140, 64 Stat. 107 [hereinafter cited as UCMJ]).

⁷ UCMJ, art. 10, 33. (U.S. CONST. amend. VI.)

57 MILITARY LAW REVIEW

be informed of the charges,⁸ a right to counsel,⁹ a right to confront witnesses,¹⁰ a right against self-incrimination,¹¹ a protection against double jeopardy,¹² a right to obtain witnesses,¹³ and protection against cruel and unusual punishments.¹⁴ No express provision was made for bail but the imposition of pretrial restraint was partially circumscribed.¹⁵ Consistent with the Fifth Amendment¹⁶ no grand jury was included, but a pretrial investigation was required in general courts-martial.¹⁷ Protection against unreasonable searches and seizures was not a part of the Code but was provided through Presidential authority to prescribe rules of evidence.¹⁸ No article of the UCMJ contained a due process clause but the Code sought to insure fairness in courts-martial by defining the composition of a court-martial,¹⁹ forbidding unlawful influence on a court-martial,²⁰ and providing for an extensive system of appellate review.²¹ Judge Latimer's opinion in *Clay* therefore evidenced an attempt, on one hand, to satisfy the high congressional expectations of the Code and Court by proclaiming the intended equalization of military and civilian justice and, on the other hand, to calm military apprehension about the new Court by bottoming the rights of servicemen on the Uniform Code of Military Justice rather than the uncertainties of constitutional law. However, the question of the proper

⁸ *Id.*, arts. 10, 35. (U.S. CONST. amend. VI.)

⁹ *Id.*, arts. 27, 38, 70. (U.S. CONST. amend. VI.)

¹⁰ *Id.*, arts. 30, 46, 49. (U.S. CONST. amend. VI.)

¹¹ *Id.*, art. 31 (U.S. CONST. amend. V.)

¹² *Id.*, art. 44 (U.S. CONST. amend. V.)

¹³ *Id.*, art. 46. (U.S. CONST. amend. VI.)

¹⁴ *Id.*, art. 55. (U.S. CONST. amend. VIII.)

¹⁵ *Id.*, arts. 7-13. (U.S. CONST. amend. VIII.)

¹⁶ "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." U.S. CONST. amend. V.

¹⁷ UCMJ, art. 32.

¹⁸ Manual for Courts-Martial, United States, 1951, para 152. Originally promulgated in Exec. Order No. 10214, 16 Fed. Reg. 1303-1419 (1951). The Manual was revised to reflect the changes occasioned by the Court of Military Appeals, the Military Justice Act of 1968, and other proposals suggested by the working group established by The Judge Advocate General on December 7, 1965. The current Manual for Courts-Martial is Exec. Order No. 10,214, 3 C.F.R. 408 (1970) [hereinafter cited as MCM]. For explanation of changes see ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION (DA PAM 27-2, July, 1970).

¹⁹ UCMJ, arts. 25-29.

²⁰ *Id.*, art. 37.

²¹ *Id.*, art. 59-76.

relationship between the Constitution and courts-martial was not resolved by the *Clay* decision.

In *United States v. Sutton*, a Navy board of review, relying on *Clay*, set aside the conviction of an accused because a deposition, taken without the presence of the accused or his trial defense counsel, had been admitted into evidence.²² After certification by The Judge Advocate General of the Navy the Court of Military Appeals reversed the Navy board which had, in effect, declared a part of Article 49 unconstitutional.²³ In the decision of the Court, Judge Latimer partially retreated from his opinion in *Clay*:

In that case we specifically stated we were building "military due process" on the laws enacted by Congress and not on the guarantees found in the Constitution. Particularly were we speaking of the [UCMJ] as the source and strength of military due process. Therefore, when we enumerated confrontation of witnesses as one of the privileges accorded an accused by Congress, we had to be considering it in the light of any limitations set out in the Code. Surely we are seeking to place military justice on the same plane as civilian justice but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level.²⁴

Judge Latimer supported his opinion by disclaiming the Court's ability to overrule Congress and by demonstrating how the Code adequately protected the rights of an accused. Judge Brosman, reflecting on the Court's ability to declare part of the UCMJ unconstitutional, concurred, finding no "fatal infirmity" in Article 49 as an exception required by practicalities of military law.²⁵ Chief Judge Quinn dissented, taking to heart Chief Justice Vinson's recent admonition in *Burns v. Wilson*²⁶ that "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." Judge Quinn, refusing to accede to the claim of military necessity, declared:

I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and

²² *United States v. Sutton*, No. 2-52-6-441, B.R. (Navy) (1953) (not reported). (It should be noted that the accused had an officer-lawyer at the time the deposition was taken but he did not submit any interrogatories and was not presented at the taking of the deposition.)

²³ *United States v. Sutton*, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

²⁴ *Id.*, at 222-23, 11 C.M.R. at 222-23.

²⁵ *Id.*, at 227-28, 11 C.M.R. at 227-28.

²⁶ 346 U.S. 137, 142 (1953).

privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself. . . . With only a single express exception, there is no withholding of the protection of these rights and privileges from an accused because he is, at the time, serving with the armed forces of his country. . . . To this express exception may be added the implied limitation of the right of trial by jury. . . . No other recognized exceptions have been cited and I know of none.²⁷

The *Clay-Sutton* majority philosophy inevitably led to strained decisions on constitutional issues. The Court frequently avoided, perhaps judiciously, the broader issue of the applicability of the Constitution to the military either by finding a petitioner's claim insufficient by the constitutional standards followed in federal courts and *ipso facto* of no merit under military law²⁸ or by resting a decision on congressional intent and the UCMJ.²⁹ Nevertheless, the early Court was unable to insulate itself completely from constitutional questions because the UCMJ and Manual for Courts-Martial contained many procedural and substantive gaps.³⁰ When confronted with a need for guidance in its decision making the Court unhesitatingly looked to federal precedent again relying on congressional intent and noting the mandate to the President in Article 36.³¹ Even then answers were not always readily available. Once embarked on the road of judicial activity the Court of Military Appeals was destined to create new principles of law. A court, behaving as a judicial body, cannot escape being a court and thereby engaging in creative interpretation if not law making.

²⁷ 3 U.S.C.M.A. 220, 228, 11 C.M.R. 220, 228.

²⁸ *E.g.*, United States v. Zimmerman, 2 U.S.C.M.A. 12, 6 C.M.R. 12 (1952) (no double jeopardy in government's right to appeal Board of Review decision); United States v. Florence, 1 U.S.C.M.A. 620, 5 C.M.R. 48 (1952) (evidence found legally seized).

²⁹ *E.g.*, United States v. Wappler, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953) (confinement on bread and water held invalid on basis of Congressional history and Art. 55 prohibition of cruel and unusual punishment rather than on eighth Amendment).

³⁰ Willis, at 83-87. Judge Quinn commented on the relationship between the court and the Manual for Courts-Martial in Quinn, *Court-Martial Practice: A View from the Top*, 22 HASTINGS L. J. 201 (1971).

³¹ UCMJ, art. 36 provides (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Difficulty with the majority position on the applicability of constitutional guarantees for military defendants soon surfaced. In consideration of the right against self-incrimination the Court had noted:

The right here violated flows, through Congressional enactment, from the Constitution of the United States. Military due process requires that courts-martial be conducted not in violation of these constitutional safeguards which Congress has seen fit to accord to members of the Armed Forces.²²

In a case decided two weeks before *Sutton*, the Court of Military Appeals held the compulsion of a handwriting specimen violated the right against self-incrimination, drawing the distinction between affirmative conduct and passive cooperation.²³ Judge Brosman, writing for the unanimous Court, stated:

Undoubtedly, it was the intent of Congress in this division of the Article to secure to persons subject to the Code the same rights secured to those of the civilian community under the Fifth Amendment to the Constitution of the United States—no more and no less. . . . Having taken the view that the protection of the Fifth Amendment extends to an involuntary handwriting specimen, it follows from what we have said previously that Article 31(a) of the Code includes the same coverage.²⁴

Though refraining in *Sutton* from applying constitutional principles to overrule a provision of the UCMJ, the Court of Military Appeals, in deciding a case according to the intent of Congress to confer an equal self-incrimination privilege, formulated a constitutional principle in an unsettled area of the law. This anomalous situation was also created in *United States v. Greer*²⁵ by the Court's holding that an accused could not be compelled to utter words for the purpose of voice identification. Although this holding exceeded federal practice, the Court again noted the serviceman's right against self-incrimination was coequal with the Fifth Amendment guarantee.²⁶ Thus, a majority of the Court was satisfying congressional intent to equalize civilian and military justice by defining and creating these rights. In

²² *United States v. Welch*, 1 U.S.C.M.A. 402, 408, 3 C.M.R. 136, 142 (1952) (note, this was opinion of Chief Judge Quinn who embraced the Clay philosophy until his dissent in *Sutton*).

²³ *United States v. Eggers*, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953), accord, *United States v. Rosato*, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953). These cases were noted in 22 GEO. WASH. REV. 371 (1954).

²⁴ 3 U.S.C.M.A. at 195, 198, 11 C.M.R. at 195, 198.

²⁵ 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).

²⁶ *Id.*, at 578, 13 C.M.R. 134 (note, opinion of Chief Judge Quinn). This case is noted with comparison to civil rules in 23 GEO. WASH. L. REV. 110 (1954).

United States v. Williamson,³⁷ Chief Judge Quinn's dissent, noting that the UCMJ provides *additional* protections to an accused, hinted at a possible reconciliation of the *Sutton* concept of congressionally sifted constitutional rights and the new law represented by *Eggers* and *Greer*. But it is questionable that reconciliation was the intent of Judge Quinn. He believed in the applicability of the Constitution to courts-martial without the sifting of the UCMJ and the *Sutton* majority maintained the position that it was congressional intent to confer an equal, not superior, right against self-incrimination.³⁸

During its first decade the Court of Military Appeals eschewed articulating fully its constitutional philosophy. The judges were nevertheless prone to spice their opinions with dictum about the relationship between the Constitution and the military accused. Chief Judge Quinn constantly referred to his dissent in *Sutton* and the full applicability of the Constitution although never finding the occasion or votes to hold unconstitutional a congressional or executive determination. Judge Latimer, the author of *Clay* and *Sutton*, found no authority or necessity for questioning the constitutional balances struck by the Uniform Code of Military Justice. Sustaining court-martial jurisdiction over a civilian employee of the Air Force in Japan he noted:

To avoid any suspicion that we are attempting to deny a person accompanying the armed service overseas all of the constitutional rights it is possible to give him, let us make ourselves clear. Once a person is held to be subject to military law, and he is tried by a court-martial, every right and privilege guaranteed to any citizen by the Constitution is granted him by the [UCMJ], with the exception of a trial by jury and a presentment of a grand jury. . . . What Congress may do in denying other rights is not before us—and probably never will be, as it is doubtful that military law will ever be changed so as to take from an accused those rights that he presently enjoys. In that connection, it should be kept in mind that the present military code so resembles enlightened civilian criminal codes that the rights, privileges, and immunities granted in the military system are, so far as practicable, at least equal to those given in civilian law.³⁹

³⁷ 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

³⁸ See *United States v. Josey*, 3 U.S.C.M.A. 767, 777, 14 C.M.R. 185, 195 (1954) (opinion of Judge Brosman); *United States v. Howard*, 5 U.S.C.M.A. 186, 194, 17 C.M.R. 186, 194 (1954). Judge Latimer did note in *Williamson* that the Court may have extended the self-incrimination right in *Eggers* and *Greer*, 4 U.S.C.M.A. at 327, 15 C.M.R. at 327.

³⁹ *United States v. Burney*, 6 U.S.C.M.A. 776, 796, 21 C.M.R. 98, 118 (1956). The holding in this case was to be repudiated by the Supreme Court in *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

Although Judge Ferguson⁴⁰ (who joined the Court in 1956) concurred without comment in reaffirming *Sutton*,⁴¹ a momentous shift in the majority constitutional philosophy was signalled in his brief concurring opinion in *United States v. Ivory*:⁴²

It is my considered opinion it cannot be contended that a man who joins our armed forces and offers his person to fight for the Constitution and the institutions predicated thereon forfeits the fundamental guarantees granted to citizens generally, except those excluded by the Constitution expressly or by necessary implication, which this document affords the accused.

Less than two years later, Judge Ferguson, with the Chief Judge concurring, overruled *Sutton* in *United States v. Jacoby*:

[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces. . . . Moreover, it is equally clear that the 6th Amendment guarantees the accused the right personally to confront the witness against him.⁴³

In dissent, Judge Latimer lamented the rejection of *stare decisis* and chastised the majority for divesting "the Supreme Court of the United States of jurisdiction to be final arbiter of the constitutionality of a Federal statute"⁴⁴ and for ignoring that "the Constitution entrusted to Congress the task of striking a precise balance between the rights of men in the service and the overriding demands of discipline and duty. . . ." ⁴⁵ Although stating that Article 49 was only being given "a correct and constitutional construction" the majority had in effect held a part of the UCMJ unconstitutional by forbidding the use of written interrogatories at trial when the defense objects.

A further step in the theoretical subordination of military law to the Constitution was taken in *United States v. Tempia*.⁴⁶ Interpreting the Supreme Court's decision in *Miranda v. Arizona*⁴⁷ as being of "constitutional dimensions," Judges Ferguson and Kilday held that the military was obliged to follow Supreme

⁴⁰ Homer F. Ferguson joined the Court in April, 1956, after the death of Judge Paul W. Brosman. Judge Ferguson is now a senior judge available for service with his consent at the call of the Chief Judge. See UCMJ, art. 67(a) (4). A tribute to his career may be found in 4 THE ADVOCATE 1 (1972).

⁴¹ *United States v. Parrish*, 7 U.S.C.M.A. 337, 22 C.M.R. 127 (1956). (Judge Latimer sustained *Sutton* by simply citing its holding and his opinion there.)

⁴² 9 U.S.C.M.A. 516, 523, 26 C.M.R. 296, 303 (1958).

⁴³ 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

⁴⁴ *Id.*, at 434, 29 C.M.R. at 250.

⁴⁵ *Id.*, at 441, 29 C.M.R. at 257.

⁴⁶ 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

⁴⁷ 384 U.S. 436 (1966).

Court guidelines in protecting an accused's right to counsel and right against self-incrimination. In sharp response to the counter-assertions of the Navy Judge Advocate General, Judge Ferguson stated:

The time is long since past—as, indeed, the United States recognizes—when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights.⁵⁰

Judge Kilday⁵¹ observed:

The decision of the Supreme Court on this constitutional question is imperatively binding upon us, a subordinate Federal court, and we have no power to revise, amend, or void any of the holdings of *Miranda*, even if we entertained views to the contrary or regarded the requirements thereof as onerous to the military authorities.⁵²

Curiously, Chief Judge Quinn dissented. The Chief Judge, naturally not disavowing the application of the Constitution to the military, focused on the concern about coerced confessions and the Supreme Court's favorable comment on the warning requirement in military law in reasoning that Article 31 was an alternate "fully effective means" of protecting the rights of an accused.⁵³

Since *Jacoby*, and particularly since *Tempia*, commentators on military jurisprudence have accepted the announced applicability of the Constitution to courts-martial. Critics of military justice recognize the proclaimed philosophy but question its completeness and authenticity in the field and on appellate review. Defenders of military justice are quick to assert that accused are better protected in military courts than civilian. However, the addition of William H. Darden to the Court of Military Appeals in 1968 has weakened the unanimity of the Court's constitutional philosophy. The present Chief Judge has acknowledged an obligation to follow Supreme Court decisions on self-incrimination⁵⁴ and search and seizure⁵⁵ and has accepted the applicability of certain

⁵⁰ 16 U.S.C.M.A. at 633, 37 C.M.R. at 253 (The Navy Judge Advocate General, in an *amicus curiae* brief, had contended that the Bill of Rights was inapplicable to courts-martial but was politely informed of his misconception).

⁵¹ Judge Kilday had joined the Court of Military Appeals in 1961; LL.B., Georgetown University, 1922; private practice, 1922-35; U.S. Congress 1939-61.

⁵² 16 U.S.C.M.A. at 641, 37 C.M.R. at 261.

⁵³ *Id.*, at 643-44, 37 C.M.R. at 263-64.

⁵⁴ *United States v. Jordan*, 20 U.S.C.M.A. 614, 617, 44 C.M.R. 44, 47 (1971); *United States v. Caiola*, 18 U.S.C.M.A. 336, 40 C.M.R. 48 (1969).

⁵⁵ *United States v. Alston*, 20 U.S.C.M.A. 581, 583, 44 C.M.R. 11, 13 (1971); *United States v. Welch*, 19 U.S.C.M.A. 134, 41 C.M.R. 134 (1969).

provisions of the Constitution where the Supreme Court has affirmatively spoken.⁵⁴ But on other constitutional questions he has embraced a modified *Clay-Sutton* philosophy bottoming his decisions solely on the UCMJ⁵⁵ and opining a lack of power to make some decisions on constitutional grounds.⁵⁶ Most unsettling in assessing the current impact of the Constitution on the Court's work is the Chief Judge's implication that the due process clause of the Fifth Amendment does not apply "*ex proprio vigore* to appellate review of military trials."⁵⁷ This unstated but apparent dissent to the *Jacoby-Tempia* perspective magnifies the significance of the recent departure of Judge Ferguson from active service. The constitutional philosophy of his successor, Robert M. Duncan,⁵⁸ will be anxiously awaited by practitioners and scholars of military justice.

Outlining the constitutional philosophy of the Court of Military Appeals is obviously not sufficient to appraise its handling of constitutional issues. Indicating past and present variances in constitutional theory also does not necessarily explain particular judgments. Whether utilizing a *Clay-Sutton*, modified *Clay-Sutton*, or *Jacoby-Tempia* approach, decisions on specific issues must be examined to determine the true impact of the Constitution on military justice.⁵⁹ Then, having made such an inquiry, the per-

⁵⁴ *United States v. Richardson*, 21 U.S.C.M.A. 54, 57, 44 C.M.R. 108, 111 (1971).

⁵⁵ *United States v. Burton*, 21 U.S.C.M.A. 112, 117-18, 44 C.M.R. 166, 171-72 (1971); *United States v. Prater*, 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971).

⁵⁶ *Petty v. Moriarty*, 20 U.S.C.M.A. 438, 444, 43 C.M.R. 278, 284 (1971) (dissenting to writ of prohibition granted to enjoin on Art. 32 proceeding where a convening authority had withdrawn charges from a special court-martial because accused requested witnesses).

⁵⁷ *United States v. Prater*, 20 U.S.C.M.A. 339, 342, 43 C.M.R. 179, 182 (1971).

⁵⁸ Judge Duncan was administered the oath of office on November 29, 1971 having served as a justice on the Supreme Court of Ohio from 1969-71. In his first opinion Judge Duncan perceived his scope of review of a search and seizure as whether "items found offend the Fourth Amendment to the United States Constitution or the requirements of paragraph 152, Manual for Courts-Martial" (*United States v. Fleener*, 21 U.S.C.M.A. 174, 180, 44 C.M.R. 228, 234 (1972)) and exhibited a due process philosophy of "fundamental fairness" in expressing outrage for the abandonment by a military judge of his impartial role (*United States v. Posey*, 21 U.S.C.M.A. 188, 192, 44 C.M.R. 242, 246 (1972)).

⁵⁹ The constitutional rights to a grand jury and petit jury obviously need not be discussed as by virtue of the Constitution they are inapplicable to trials by court-martial. See notes 248-49 and text *infra*. The Eighth Amendment protection against cruel and unusual punishment and excessive fines and the Sixth Amendment right to be informed of the nature and cause of accusation are not separately treated because of the scarcity of cases (confinement on bread and water held invalid sentence on basis of

formance of the Court as an institution may be better understood.

B. CONSTITUTIONAL RIGHTS AND THE COURT OF MILITARY APPEALS

1. *The Right Against Self-Incrimination.*

Article 31 of the Uniform Code of Military Justice was plainly intended to secure the right against self-incrimination for the military accused and, in fact, the nature and extent of the warning requirements were model penal provisions at the time of their enactment.⁶⁰ The protection of this right has supplied the largest number of "constitutional cases" for the Court of Military Appeals and has provoked much comment and analysis. It is therefore not surprising that the right against self-incrimination best mirrors the development of the constitutional philosophy of

legislative intent and Art. 55 rather than Eighth Amendment in *United States v. Wappler*, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953)) and their adequate safeguarding by the UCMJ (Arts. 55, 10, 35). The due process clause of the Fifth Amendment, which probably deserves separate treatment, is not specifically discussed in this section although the concept of due process is inextricably woven into the work of any criminal court. The concept of military due process postulated in *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951) encompasses all of a military accused's statutory and regulatory rights. To the adherent to the Jacoby-Tempia constitutional philosophy military due process is coterminous with, and something more than, constitutional due process. See Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S U.L. REV., 225 (1961). To the Clay-Sutton school military due process is separate from the due process clause of the Fifth Amendment and is in essence the sum of a military accused's rights. See opinion of Darden, C.J., in *United States v. Prater*, 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971). The Court utilized the art. I, sec. 9, proscription against *ex post facto* laws in limiting the Manual changes to rules governing the corroboration of confessions. *United States v. Hise*, 20 U.S.C.M.A. 3, 42 C.M.R. 195 (1970).

⁶⁰ UCMJ, art. 31, provides:

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

the Court. In its first consideration of the voluntariness of a confession the Court noted:

We believe that the principles discussed above are equally applicable to military criminal justice. A confession by a soldier or sailor following inducements calculated to arouse either hope or fear is just as untrustworthy in a court-martial as it is in a civilian criminal court. . . . We may note, in passing, that the very existence of military discipline in the armed forces gives cause for additional suspicion toward confessions given in the presence of military superiors.⁶¹

The *Clay* theory of the applicability of the Constitution was embraced in the Court's early treatment of the self-incrimination privilege. In *United States v. Welch*⁶² Chief Judge Quinn stated, "The right here flows, through Congressional enactment, from the Constitution of the United States." As previously discussed, the early Court equated Article 31 with the Fifth Amendment guarantee and created anomalies by forbidding the evidentiary use of involuntary handwriting exemplars and voice identifications.⁶³ Recognizing the inconsistency in those cases the Court restricted their previous holdings by focusing on the word, "statement," and on the uniqueness of the warning requirement in proclaiming that Article 31 was wider in scope than the Fifth Amendment.⁶⁴ Thus, in invalidating orders to submit to a urine test⁶⁵ and to a blood test,⁶⁶ the Court relied on Article 31 instead of the Constitution. After the Supreme Court held handwriting exemplars outside the protection of the Fifth Amendment, the Court of Military Appeals reaffirmed its former decisions noting that they were based on an interpretation of a

⁶¹ *United States v. Monge*, 1 U.S.C.M.A. 95, 98, 2 C.M.R. 1, 4 (1952). The inherent coerciveness of certain military situations was a factor in the reversal of a young officer's conviction for cheating on an exam where statements were made by him in an official investigation conducted for his former commanding officer in *United States v. Welch*, 1 U.S.C.M.A. 402, 3 C.M.R. 137 (1952). One student of military law has, however, found military courts insensitive to inherent coercion of situations involving superiors see *Sherman, Civilianization*, 71-72, *supra* note 2. See also note 70 *infra*.

⁶² 1 U.S.C.M.A. 402, 407, 3 C.M.R. 137, 142 (1952).

⁶³ See notes 33-38 and text *supra*.

⁶⁴ *United States v. Minnifield*, 9 U.S.C.M.A. 373, 26 C.M.R. 152 (1958) (in court handwriting exemplar unlawfully taken).

⁶⁵ *United States v. Forslund*, 10 U.S.C.M.A. 8, 27 C.M.R. 82 (1958); *United States v. Jordan*, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957); see also *United States v. McClung*, 11 U.S.C.M.A. 754, 29 C.M.R. 570 (1960) (involuntariness found where accused in semi-conscious state).

⁶⁶ *United States v. Musquire*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958); but noted *United States v. Miller*, 15 U.S.C.M.A. 320, 35 C.M.R. 292 (1965) (blood sample taken from unconscious person for medical reasons admissible).

statute wider in scope than the Fifth Amendment.⁶⁷ Without pausing to question the logic or historical accuracy behind the Court's reasoning, this decision, coupled with the acceptance of constitutional guidelines in *Tempia*,⁶⁸ means that a military defendant is protected by the Fifth Amendment right against self-incrimination or Article 31, whichever is broader in a given instance. A military accused consequently benefits from the Article 31 application to non-verbal statements,⁶⁹ non-custodial situations,⁷⁰ and admissions as well as confessions⁷¹ and enjoys the

⁶⁷ Compare *Gilbert v. California*, 388 U.S. 263 (1967) with *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967). However, the COMA has held that handwriting exemplars taken by civilian police or secret service investigators need not be preceded by a Miranda warning *see United States v. Lewis*, 18 U.S.C.M.A. 355, 40 C.M.R. 67 (1969); *United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969). For similar adherence by COMA to decisions on voice identifications compare *United States v. Wade*, 388 U.S. 218 (1967) with *United States v. Mewborn*, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

⁶⁸ 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

⁶⁹ *See* notes 63-67 and text *supra*. "Testimonial acts" will also be inadmissible unless preceded by an Article 31 warning *see United States v. Nowling*, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958) (production of a pass); *United States v. Taylor*, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954) (pointing to clothing containing marihuana); but note, *United States v. Morse*, 9 U.S.C.M.A. 799, 27 C.M.R. 67 (1958) (visual inspection of hands and clothing under ultraviolet light not need be preceded by Article 31 warning). *See also Reilly, Non-verbal Statements: Observations on a Unique Concept Employed By Military Court*, 25 JAG J. 24 (1970).

⁷⁰ *United States v. Harvey*, 21 U.S.C.M.A. 39, 44 C.M.R. 93 (1971) (sergeant superior in rank and position required to give warnings); *United States v. Souder*, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959) (naval officer running a shop required to give warnings to suspected thieves); *United States v. Diterlizzi*, 8 U.S.C.M.A. 334, 24 C.M.R. 144 (1957) (air policeman required to give warning at accident scene); *United States v. Wilson*, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953); but *see United States v. Babbidge*, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969) (required submission to board of psychiatrists when insanity raised at trial not a violation of Article 31 or Fifth Amendment); *United States v. Vogel*, 18 U.S.C.M.A. 160, 39 C.M.R. 160 (1969) (warning not required when accused voluntarily approached officer he was to report to at a later time); *United States v. Hinkson*, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967) (undercover agent in station lobby need not warn); *United States v. Baker*, 11 U.S.C.M.A. 313, 29 C.M.R. 129 (1960) (doctor treating narcotic patients need not give Article 31 warnings). Warnings are also not required for private conversations *see United States v. Beck*, 15 U.S.C.M.A. 333, 35 C.M.R. 305 (1965); *United States v. Johnson*, 5 U.S.C.M.A. 795, 19 C.M.R. 91 (1955); *United States v. Dandaneau*, 5 U.S.C.M.A. 462, 18 C.M.R. 86 (1955).

⁷¹ *United States v. Lincoln*, 17 U.S.C.M.A. 330, 38 C.M.R. 128 (1967); critically noted in 9 WM. & MARY L. REV. 845 (1968).

warning requirement protections of *Miranda* and its progeny.⁷² Owing primarily to the expanded meaning of Article 31 and twenty years of precedent the Court of Military Appeals has little current need to rely on the constitutional guarantees against self-incrimination.⁷³ A recent dramatic example of generally broader military rights was the holding that Manual changes explicitly occasioned by *Miranda* and *Tempia*⁷⁴ prevailed over a Supreme Court decision permitting the use of unwarned statements for impeachment.⁷⁵ There is one exception to the broader military rights. In *United States v. Kirsch*⁷⁶ the Court of Military Appeals affirmed a conviction of willful refusal to testify notwithstanding the absence of specific statutory authority for a proposed grant of immunity. Rather than adhere to federal court decisions strictly construing the authority to grant immunity⁷⁷ the Court strained to find statutory authorization in legislative acquiescence to longstanding military practice.⁷⁸ Those subject to the UCMJ must therefore accept what is more akin to equitable immunity than transactional immunity.⁷⁹

2. Protection Against Double Jeopardy.

Although the Court of Military Appeals draws on federal court opinions, there has been little need to utilize the Fifth

⁷² See Addlestone and Wymne, *Miranda and Military Justice*, 11 A.F. JAG L. REV. 223 (1969); Birnbaum, *The Effect of Recent Supreme Court Decisions on Military Law*, 36 FORDHAM L. REV. 153 (1967); Hansen, *Miranda and the Military Development of a Constitutional Right*, 42 MIL. L. REV. 55 (1968).

⁷³ See following cases recently decided without reference to Fifth Amendment, *United States v. Gaines*, 21 U.S.C.M.A. 236, 45 C.M.R. 10 (1972); *United States v. Fisher*, 21 U.S.C.M.A. 223, 44 C.M.R. 277 (1972) (strongly affirming the exclusion from warning of a doctor treating a patient); *United States v. Henry*, 21 U.S.C.M.A. 98, 44 C.M.R. 152 (1971); *United States v. England*, 21 U.S.C.M.A. 88, 44 C.M.R. 142 (1971).

⁷⁴ See para 140a(2), DA PAM 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL UNITED STATES 1969, REVISED EDITION (July, 1970).

⁷⁵ *United States v. Jordan*, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971). This case is discussed in Armstrong, *The Impeachment Exception to the Exclusionary Rules: The Military's Options in the Wake of Jordan and Harris*, 26 JAG J. 1 (1971) and noted in 52 MIL. L. REV. 180 (1971).

⁷⁶ 15 U.S.C.M.A. 54, 35 C.M.R. 56 (1964).

⁷⁷ E.g., *Burdick v. United States*, 236 U.S. 79 (1915); *United States v. Ford*, 99 U.S. 594 (1879); *Issacs v. United States*, 256 F. 2d 654 (8th Cir. 1958); *Earl v. United States*, 361 F. 2d 531 (D.C. Cir. 1966).

⁷⁸ 15 U.S.C.M.A. 84, 90-94, 35 C.M.R. 56, 62-66 (1964) (Judge Ferguson dissented unable to find any statutory authority for the immunity offered).

⁷⁹ For excellent discussion of *Kirsch* case and the state of immunity in military law see Green, *Grants of Immunity and Military Law*, 53 MIL. L. REV. 1 (1971). An earlier and also thorough treatment may be found in Grimm, *Grants or Promises of Immunity Under Military Law* (1957) (unpublished thesis at Judge Advocate General's School).

57 MILITARY LAW REVIEW

Amendment in its decision making as UCMJ, Article 44, provides:

(a) No person may, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article."

In applying Article 44 the Court generally followed federal practice on waivers⁸¹ and mistrials.⁸² Section (b) has been interpreted to allow the government an appeal from an adverse decision of a Court of Military Review.⁸³ Since they derive power from the same sovereign, a trial by court-martial or by a federal district court would bar a subsequent trial by the other. There is no similar constitutional or other express protection against trial by a state and a court-martial for the same offense.⁸⁴ In the absence of a Status of Forces agreement a serviceman may be tried by court-martial and a foreign government.⁸⁵ Owing to the

"UCMJ, Art. 44. The former jeopardy provision is supplemented by Articles 62 and 63 which prevent a reconsideration or rehearing on a finding of not guilty and which impose an original sentence as the maximum which may be given on a rehearing.

"United States v. Schilling, 7 U.S.C.M.A. 482, 22 C.M.R. 273 (1957); United States v. Kreitzer, 2 U.S.C.M.A. 284, 8 C.M.R. 84 (1953).

"United States v. Waldron, 15 U.S.C.M.A. 628, 36 C.M.R. 126 (1966); United States v. Lynch, 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958); United States v. Richard, 7 U.S.C.M.A. 46, 21 C.M.R. 172 (1956).

"United States v. Ivory, 9 U.S.C.M.A. 516, 26 C.M.R. 296 (1958); United States v. Zimmerman, 2 U.S.C.M.A. 12, 6 C.M.R. 12 (1952).

"United States v. Rosenblatt, 13 U.S.C.M.A. 28, 32 C.M.R. 28 (1962). Army policy is set forth in paragraph 6-2, Army Reg. No. 27-10 (26 Nov. 1968):

"A person subject to the Uniform Code of Military Justice who has been tried in a civil court *normally* will not be tried by court-martial or punished under the Uniform Code of Military Justice, Article 15, for the same act or acts over which the civil court has exercised jurisdiction." Rarely does the military attempt such double jeopardy *but see* United States v. Borys, 18 U.S.C.M.A. 545, 40 C.M.R. 259 (1969). The American Legion has long lobbied for a statutory prohibition against dual sovereign double jeopardy. *See* H.R. 3455, 86th Cong., 1st Sess. (1959).

"United States v. Caddenhead, 14 U.S.C.M.A. 271, 34 C.M.R. 51 (1963) (juvenile proceeding in Japan held not criminal and no bar to court-martial); United States v. Aau, 12 U.S.C.M.A. 332, 30 C.M.R. 332 (1961) (forgiveness for homicide under Samoan custom no basis for former jeopardy claim); United States v. Sinigar, 6 U.S.C.M.A. 330, 20 C.M.R. 46

pecularity of the military justice system the Court of Military Appeals has closely scrutinized the withdrawal of charges from a court-martial, requiring "manifest necessity" or "good cause" after arraignment.⁸⁶ Sentences on rehearsing have been limited beyond what may be constitutionally required to the lowest sentence formerly approved.⁸⁷ Also in the military nonjudicial punishment under Article 15 and administrative discipline within a stockade under Article 13 may bar trial for the same offense depending upon the facts and circumstances of each case.⁸⁸

It may be fairly stated that the Court of Military Appeals respects the strictures of the Fifth Amendment but Article 44 forms the boundary for the protection against double jeopardy in the military.⁸⁹ The differences in constitutional philosophy among the recent judges was plainly exhibited in *United States v. Richardson*.⁹⁰ Chief Judge Darden acknowledged Supreme Court statements that the Fifth Amendment may be invoked at a court-martial proceeding but implied that the constitutional protection was no broader than Article 44.⁹¹ Even assuming that the Fifth Amendment was broader, he distinguished a recent

(1955) (sentence under Canadian contempt proceeding held no bar to court-martial for bringing discredit upon armed services).

"United States v. Fleming, 18 U.S.C.M.A. 524, 40 C.M.R. 236 (1969) (not good cause because judge refused to accept guilty plea and granted continuance to gather evidence); United States v. Williams, 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960) (not good cause because convening authority didn't like lenient sentences); United States v. Schilling, 7 U.S.C.M.A. 482, 22 C.M.R. 272 (1957) (found where recording machine broke); United States v. Stringer, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954) (not found where president of court made prejudicial remark once trial begun for law officer, not convening authority, responsible for its proper conduct).

"United States v. Kelley, 5 U.S.C.M.A. 259, 17 C.M.R. 259 (1954).

"Article 13 permits minor punishment for infractions of discipline while in arrest or confinement and Article 15 does not bar trial for a serious offense growing out of the same act or omission. The few cases refer to "minor" versus "serious" offenses but these terms are somewhat ambiguous. See *United States v. Harding*, 11 U.S.C.M.A. 674, 29 C.M.R. 490 (1960) (disciplinary segregation for assault on fellow prisoner not a bar to court-martial); *United States v. Fretwell*, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960) (non-judicial punishment of naval officer for drunkenness did not bar trial by general court-martial); *United States v. Williams*, 10 U.S.C.M.A. 615, 28 C.M.R. 181 (1959) (disciplinary segregation with restricted diet a bar to trial for disrespect to stockade NCO); *United States v. Vaughn*, 3 U.S.C.M.A. 121, 11 C.M.R. 121 (1953) (14 days restricted diet and 30 days disciplinary segregation to bar to court-martial for escape from confinement).

"See *Kates, Former Jeopardy—A Comparison of the Military and Civilian Right*, 15 MIL. L. REV. 51 (1962).

"21 U.S.C.M.A. 54, 44 C.M.R. 108 (1971).

"Id., at 57, 44 C.M.R. at 111.

57 MILITARY LAW REVIEW

Supreme Court decision,⁹² in construing Article 44(b) to permit a retrial after a military judge declared a mistrial *after findings* for inadequacy of counsel. The proponents of the *Jacoby-Tempia* constitutional philosophy who had previously stated that the UCMJ was not the full measure of a military accused's double jeopardy protection⁹³ differed with the Chief Judge. Judge Quinn dissented from the interpretation of Article 44(b) which he felt would sanction "retrial of an accused for murder when he had been found guilty only of manslaughter." However, he found the military judge's actions appropriate since the inadequacy of counsel probably also tainted the findings.⁹⁴ In dissent Judge Ferguson likewise expressed concern over the expanded meaning being given to Article 44(b) and could find no authority for retrial under Article 44 and the Fifth Amendment where the military judge erroneously declared a mistrial.⁹⁵

3. *The Right to Have the Assistance of Counsel.*

A serviceman's right to counsel at a court-martial is specifically provided by the Uniform Code of Military Justice. The UCMJ has always provided for legally trained counsel at general courts-martial. With the implementation of the Military Justice Act of 1968 lawyer-counsel is required at special courts-martial which may adjudge a bad conduct discharge and otherwise provided if requested by an accused.⁹⁶ There is no provision for counsel at a summary court-martial.⁹⁷ In addition, an accused may retain civilian counsel at his own expense or request a specific military counsel if that person is reasonably available.⁹⁸ Once convicted, a person also has the right to legally qualified military counsel or civilian counsel hired at his expense in the

⁹² *United States v. Join*, 400 U.S. 470 (1971).

⁹³ *United States v. Ivory*, 9 U.S.C.M.A. 516, 522, 26 C.M.R. 296, 302 (1958).

⁹⁴ 21 U.S.C.M.A. 54, 58-9, 44 C.M.R. 108, 112-13 (1971).

⁹⁵ *Id.*, at 59-61, 44 C.M.R. at 113-115.

⁹⁶ UCMJ, arts. 19, 27. The right to qualified counsel at special courts-martial which cannot adjudge a bad conduct discharge is still subject to availability "on account of physical conditions or military exigencies." Such a situation is extremely rare.

⁹⁷ There is no mention in the UCMJ about the right to counsel before a summary court-martial which can only adjudge a maximum of thirty days. The MCM, para 79, in its description of summary courts-martial does not refer to counsel. The summary court officer wears the hats of prosecutor, defense counsel, and judge. However, counsel has been known to appear at these "tribunals." An accused may refuse trial by summary court-martial at the risk of subjecting himself to the greater maximum punishments of a special court-martial. Many persons have called for the abolition of these "inferior courts" including Sen. Ervin, *The Military Justice Act of 1968*, 45 *Mn. L. Rev.* 77, 95 (1968).

⁹⁸ UCMJ, art. 38(b).

military appellate process.⁹⁹ Thus, there was no *Gideon v. Wainwright*¹⁰⁰ issue for the post-Code military justice system. However, the stages in criminal proceedings at which counsel must be provided and the meaning of counsel have produced considerable case law.

The Uniform Code of Military Justice provides that an accused may have the assistance of counsel at a pretrial investigation before charges can be referred to a general court-martial.¹⁰¹ The Court of Military Appeals has labeled this proceeding "judicial" and has interpreted its counsel provision to mean legally qualified counsel.¹⁰² The right to counsel at the Article 32 investigation may be waived during this pretrial hearing, by no objection at trial, or by a guilty plea.¹⁰³ In 1954 the Court, sustaining two convictions obtained with the use of confessions, observed that there was no right to appointed counsel prior to the filing of charges.¹⁰⁴ However, three years later the Court modified its position in *United States v. Gunnels*.¹⁰⁵ Citing the Sixth Amendment to the Constitution and relevant Supreme Court cases Chief Judge Quinn stated:

The right is not limited to the trial itself, but includes the pretrial proceedings during which counsel investigates the facts and prepares the defense. . . . The distinction between a criminal proceeding and an investigation does not, however, mean that a person suspected of the commission of a crime can be precluded from consulting counsel.¹⁰⁶

This decision was followed by several cases solidifying the right to seek legal advice during pretrial stages.¹⁰⁷ As previously noted, the Court of Military Appeals has embraced the *Miranda* de-

⁹⁹ *Id.*, art. 70.

¹⁰⁰ 372 U.S. 335 (1963) (requiring states to appoint counsel for indigents, at least in felony cases).

¹⁰¹ UCMJ, art. 32.

¹⁰² *United States v. Tomaszewski*, 8 U.S.C.M.A. 266, 24 C.M.R. 76 (1957).

¹⁰³ *United States v. Courtier*, 20 U.S.C.M.A. 278, 43 C.M.R. 118 (1971); *United States v. Mickel*, 9 U.S.C.M.A. 324, 26 C.M.R. 104 (1958).

¹⁰⁴ *United States v. Moore*, 4 U.S.C.M.A. 482, 16 C.M.R. 56 (1954); *United States v. Manuel*, 3 U.S.C.M.A. 739, 14 C.M.R. 157 (1954).

¹⁰⁵ 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

¹⁰⁶ *Id.*, at 133, 23 C.M.R. at 357.

¹⁰⁷ *E.g.*, *United States v. Brown*, 13 U.S.C.M.A. 14, 32 C.M.R. 14 (1962) (asked to see lawyer but was taken to non-lawyer officer who advised to confess); *United States v. Wheaton*, 9 U.S.C.M.A. 257, 26 C.M.R. 37 (1953); (accused who asked for counsel was misadvised by investigator who said he had no right); *United States v. Rose*, 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957) (accused improperly denied right to call his attorney).

57 MILITARY LAW REVIEW

cision as a constitutional principle and has generally followed the federal court practice in applying *Miranda*.¹⁰⁸

The Court of Military Appeals has been concerned with the quality, availability, and conduct of counsel and has required military judges to personally inquire into an accused's understanding of his right to counsel.¹⁰⁹ Practice before general courts-martial has been limited to members of a recognized bar¹¹⁰ although the Court has allowed an accused, if knowingly and willingly requested, to represent himself¹¹¹ and to be represented by non-certified military lawyers under the direction of a certified military lawyer.¹¹² At a special court-martial the defense counsel must have qualifications equal to those of the trial

¹⁰⁸ *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). For comments on *Tempia* see notes 71-72 *supra*. Although COMA did follow *Miranda* some 10 months after its pronouncement, in an earlier decision the Court had said in construing *Escobedo v. Illinois*, 378 U.S. 478 (1964):

"This Court has always been alert to the accused's need for counsel at all stages of the proceedings against him. We are not persuaded, however, that the right to counsel must be extended to include the investigative processes. . . . Nothing in the Uniform Code, *supra*, or in the decisions of this Court, and nothing in our experience with military methods of interrogation, indicate that the only feasible way to give maximum effect to the Constitutional right to the assistance of counsel is that the accused have counsel beside him during police questioning. . . . We adhere, therefore, to our previous decision, and hold that an incriminating statement given by the accused in a police interrogation, which meets the requirements of Article 31, is admissible in evidence, even though the accused is not informed he has the right to consult counsel during the questioning." (*United States v. Wimberley*, 16 U.S.C.M.A. 3, 10, 36 C.M.R. 159, 166 (1966).) While COMA did follow *Miranda* in requiring counsel rights as a part of a warning this decision manifests that COMA can and will arrive at different conclusions than the Supreme Court on constitutional issues. If COMA had not followed the *Miranda* decision it is open to doubt whether federal courts in a habeas corpus proceeding giving "full and fair consideration" to a military decision would have required a *Miranda* warning in a military case. See *Barker, Military Law—A Separate System of Jurisprudence*, 36 U. CINN. L. REV. 223, 225 (1967), suggesting that COMA was "voluntarily assuming responsibilities not required by the Constitution" in *Tempia*.

¹⁰⁹ *United States v. Donohew*, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969). But note, failure to advise accused of right to have appointed counsel assist individual counsel not error, *United States v. Turner*, 20 U.S.C.M.A. 167, 43 C.M.R. 7 (1970).

¹¹⁰ *United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958). Noted in *Military Justice: A New Attempt to Advance Individual Rights*, 1959 DUKE L. J. 470.

¹¹¹ *United States v. Howell*, 11 U.S.C.M.A. 712, 29 C.M.R. 528 (1960).

¹¹² *United States v. McFadden*, 19 U.S.C.M.A. 42, 42 C.M.R. 14 (1970). See also *United States v. Armstrong*, C.M.R. (ACMR 1971), *pet. denied*, 21 U.S.C.M.A. (1972) (a non-lawyer's active participation in a general court-martial was held error but not prejudicial).

counsel.¹¹³ An accused may select an enlisted man to conduct his defense but officer counsel must nevertheless be appointed by the convening authority.¹¹⁴ An accused may also request a particular military counsel¹¹⁵ and obtain the assistance of civilian counsel.¹¹⁶ Despite the constitutional and statutory provisions for counsel and their extension by judicial decisions, the Court of Military Appeals has found it necessary to closely supervise the conduct and performance of counsel to insure adequate representation for the military defendant. Whether this monitoring reflects an awareness of the relative inexperience of most military counsel¹¹⁷ or a sensitivity to actual or potential command

¹¹³ UCMJ, art. 27(c). *But see* United States v. Hubbard, 20 U.S.C.M.A. 482, 43 C.M.R. 322 (1971) (tacit approval to trial counsel being immediate superior of defense counsel).

¹¹⁴ United States v. Long, 5 U.S.C.M.A. 572, 18 C.M.R. 196 (1955).

¹¹⁵ The determination of reasonable availability is a command decision which will not be overturned unless an abuse of discretion is shown. United States v. Vanderpoll, 4 U.S.C.M.A. 561, 16 C.M.R. 135 (1954). Although this request may be appealed to a next higher command and renewed at trial and on review for an abuse of discretion it is a potential opportunity for abuse *see* note 120 *infra*. COMA has held that a mere administrative transfer or reassignment will not make a selected counsel unavailable. United States v. Murray, 20 U.S.C.M.A. 61, 42 C.M.R. 253 (1970). However, *see* United States v. Johnson, 20 U.S.C.M.A. 359, 43 C.M.R. 199 (1971) (no abuse of discretion to deny continuance of deposition for seeking availability of selected counsel) and United States v. Courtier, 20 U.S.C.M.A. 278, 43 C.M.R. 118 (1971) (no denial of requested counsel at Article 32 as counsel had adequate time after Article 32 and before trial to prepare defense); United States v. Gatewood, 15 U.S.C.M.A. 433, 35 C.M.R. 405 (1965) (no abuse of discretion where requested military counsel had heavy GCM caseload). Although Gatewood implied that reasons for denials should be specified apparently the mere statement by a convening authority that a requested counsel is not reasonably available is sufficient. United States v. Roberson, No. 70-1811, B. R. (Navy) (1970) (not reported), *post. denied*, 20 U.S.C.M.A. 648 (1970) (*see* dissent of Ferguson, J. to denial of petition for review).

¹¹⁶ The denial of opportunity to obtain civilian counsel may be prejudicial error. United States v. Donati, 14 U.S.C.M.A. 235, 34 C.M.R. 15 (1963); United States v. Potte, 14 U.S.C.M.A. 118, 33 C.M.R. 330 (1963); An accused who retains civilian counsel may also retain the services of his appointed military counsel. United States v. Tellier, 13 U.S.C.M.A. 323, 32 C.M.R. 323 (1962). The Court found no bar to a military counsel continuing his representation after returning to civilian life. United States v. Andrews, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (1972). For discussion on relationship between co-counselors *see* Wilder, *Relationship Between Appointed and Individual Defense Counsel*, 21 MIL. L. REV. 37 (1963).

¹¹⁷ Most military trial and defense counsel are relatively young and inexperienced serving a short tour of 3-5 years in the military before returning to civilian life. Active appellate scrutiny of the adequacy of counsel is also undoubtedly related to the usual representation on appeal by a counsel different than the trial defense counsel. *See* note 99 *supra*.

influence, the Court has reversed for conflicts of interest,¹¹⁸ inadequate representation,¹¹⁹ and improper arguments of defense counsel.¹²⁰ These cases reflect structural deficiencies in the military justice system related more to the effectiveness of counsel than to the constitutional right to counsel.¹²¹

¹¹⁸ *E.g.*, *United States v. Williams*, 21 U.S.C.M.A. 292, 45 C.M.R. 66 (1972) (defense counsel improperly acted for staff judge advocate in sending clemency action back to TJAG for withdrawal); *United States v. Collier*, 20 U.S.C.M.A. 261, 43 C.M.R. 101 (1971) (officer who had previously advised accused on a charge cannot be appointed trial counsel); *United States v. Faylor*, 9 U.S.C.M.A. 547, 26 C.M.R. 327 (1958) (reversed where defense counsel representing two accused argued for lighter sentence of one by throwing blame on the other).

¹¹⁹ *E.g.*, *United States v. Broy*, 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964) (failure of defense counsel to present evidence on sentencing particularly where pretrial confinement unduly harsh); *United States v. Huff*, 11 U.S.C.M.A. 397, 29 C.M.R. 213 (1960) (failure to rebut influence of uncharged conduct and presenting evidence on sentence contrary to accused's interest); *United States v. McFarlane*, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957) (plea of guilty and only 10 days preparation inadequate in a capital case); *United States v. Parker*, 6 U.S.C.M.A. 75, 19 C.M.R. 201 (1955) (inadequate representation found in capital case where defense counsel had not examined witnesses prior to trial, no voir dire of the court, no challenges although court specially selected, only two objections during trial, no instructions requested, no testimony by defense on the merits, no attempt to avoid death penalty). Lately, either the Court has displayed more confidence in military counsel or the quality of representation has improved as there have been no reversals for inadequacy of counsel (except for argument on sentence) since *United States v. Colarusso*, 18 U.S.C.M.A. 94, 39 C.M.R. 94 (1969) (mistake of counsel resulting in judicial admission by accused).

¹²⁰ *United States v. Holcomb*, 20 U.S.C.M.A. 309, 43 C.M.R. 149 (1971) (case ordered reheard on sentencing where counsel's argument contained remark that the accused "doesn't deserve another chance"); *United States v. Pointer*, 18 U.S.C.M.A. 587, 40 C.M.R. 299 (1969) (failure of defense to inform court of service in Vietnam and letter of commendation required sentence rehearing); *United States v. Mitchell*, 16 U.S.C.M.A. 302, 32 C.M.R. 458 (1966) (defense counsel cannot concede punitive discharge); *United States v. Hampton*, 16 U.S.C.M.A. 304, 36 C.M.R. 460 (1966) (improper for defense counsel to concede in findings argument that prosecution had proven its case). However, it is appropriate to argue for a punitive discharge if an accused expressly states his desire for discharge on the record, *United States v. Weatherford*, 19 U.S.C.M.A. 424, 42 C.M.R. 26 (1970), and may even be appropriate in the absence of an express desire where an accused testifies he would absent himself if returned to duty, *United States v. Richard*, 21 U.S.C.M.A. 227, 44 C.M.R. 281 (1972); *United States v. Drake*, 21 U.S.C.M.A. 226, 44 C.M.R. 280 (1972). The Court has also been lenient in not imposing waivers on the trial conduct of non-lawyer defense counsel *see e.g.*, *United States v. Johnson*, 14 U.S.C.M.A. 75, 33 C.M.R. 257 (1963); *United States v. Kelley*, 7 U.S.C.M.A. 584, 23 C.M.R. 48 (1957); *United States v. Pinkston*, 6 U.S.C.M.A. 700, 21 C.M.R. 22 (1956).

¹²¹ One writer has suggested that the Court's close scrutiny of defense counsel reflects dissatisfaction with the performance of military counsel. Cobbs, *The United States Court of Military Appeals and the Defense Coun-*

Although the right to counsel at courts-martial is presently guaranteed by statute and the right of counsel prior to trial is secured by *Tempia*, the strength of the proclaimed applicability of the Sixth Amendment by the Court of Military Appeals may be questioned. In at least one instance the Sixth Amendment was subjected to a strained application. In 1963 a Navy board of review set aside a conviction as in violation of the Sixth Amendment right to counsel where an accused received a bad conduct discharge at a special court-martial without representation by legally qualified counsel.¹²² This decision was reversed although a majority of the Court proclaimed the Sixth Amendment right to counsel applicable to the military.¹²³ In substance, the Court held that Congress could set the qualifications for counsel at courts-martial. The historical practice of appointing non-lawyer officers as counsel evidenced no constitutional infirmity.¹²⁴ The Court's reasoning was somewhat disingenuous in

122 12 MIL. L. REV. 131 (1961). For an excellent discussion of the pressures on a military defense counsel see Murphy, *The Army Counsel: Unusual Ethics For An Unusual Advocate*, 61 COLUM. L. REV. 233 (1961). See also Avins, *Duty of Military Defense Counsel to an Accused*, 58 MICH. L. REV. 347 (1960); Horton, *Professional Ethics and The Military Defense Counsel*, 5 MIL. L. REV. 67 (1959). In addition to their relative inexperience the author feels the actual or felt lack of independence of defense counsel diminishes the effectiveness of the representation afforded a military accused. Office pressure, the sudden shifts of defense counsel to prosecution or claims, and the fear of an undesirable overseas assignment operate in the conscious and subconscious of a military defense counsel whether justified or not. For a case history of one extreme incident of the consequences of a zealous defense see West, *The Command Domination of the Military Judicial Process*, Part II, ch. IX., Aug. 10, 1969 (unpublished thesis in George Washington University Law School, Washington, D.C.). There have been numerous suggestions for securing independence for defense counsel including a proposal by Senator Birch Bayh. See 116 CONG. REC. 10438 (daily ed. July 1, 1970). Comparing representation by military counsel to public defender programs, which are also overworked and receive compensation unrelated to performance, one observes that such institutions tend to develop a marked disposition to plea bargaining, intimate relationship with prosecutors, and organizational stagnation, with the biggest threat to effective representation being "the impersonal, bureaucratic nature of a system in which large numbers of clients are processed by a relatively small number of attorneys." Comment, *The Right to Competent and Effective Counsel Under the Uniform Code of Military Justice*, 46 TULANE L. REV. 293, 302-03 (1971).

¹²³ *United States v. Culp*, NCM 63-00442 (1963) (not reported).

¹²⁴ 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

¹²⁵ Judge Kilday, citing the long history of officer representation at courts-martial, the acceptance of the practice by federal courts, the common law at the time of the adoption of the Constitution, and the foreclosure of Supreme Court review of a contrary decision, found the right to counsel provision of the 6th Amendment not applicable. Chief Judge Quinn thought the 6th Amendment provision applied to the military but that the Congressional provision of officers for special courts-martial was a reasonable com-

view of its previous decisions involving non-lawyer counsel, limiting the practice of non-lawyers before general courts-martial and interpreting the pretrial rights to counsel as meaning legally qualified counsel.¹²⁵ One note summarized the right to counsel in the military after *Culp*, "Rubbing the metal of the UCMJ against the constitutional touchstone of the right to counsel as interpreted in the decisions through *Gideon* produces the inescapable conclusion that an impurity exists."¹²⁶ It could be argued that a special court-martial, being of limited sentencing power, is not affected by *Gideon*. This argument pales with the recognition that special courts-martial do try many serious offenses¹²⁷ and in view of the Court's opinion that a bad conduct discharge is a more severe punishment than confinement.¹²⁸ Thus, after *Tempia* a military accused had a constitutional right to qualified counsel at critical pretrial stages but lost that right if his case was subsequently referred to a special court-martial. While the *Culp* issue has become moot under the Military Justice Act of 1968, the Court's opinion evidences unwillingness to find a constitutional deficiency in the UCMJ and concern about the effects on the military of a sharp break in tradition.¹²⁹

4. *The Right to Confrontation and Compulsory Process.*

It was the Court's decision in *United States v. Jacoby*¹³⁰ that marked the turning point in the search for a constitutional

pliance with the Constitution. Judge Ferguson stated that the Sixth Amendment did apply but the accused had waived his right by consenting to representation by non-lawyer appointed counsel. Judge Ferguson also felt that the question was moot since the Board of Review decision was based on dual grounds. In 1965 two federal district courts came to opposite conclusions on the sixth amendment right to counsel in courts-martial. In re Stapley, 246 F. Supp. 316 (D. Utah 1965) (granted writ of habeas corpus for denial of right to qualified counsel); *contra*, LeBallister v. Warden, 247 F. Supp. 349 (D. Kan. 1965), *see also* Kennedy v. Commandant, 377 F. 2d 339 (10th Cir., 1967).

¹²⁵ See notes, 102, 106, 110, 118-21 and accompanying text.

¹²⁶ 50 MINN. L. REV. 147, 167 (1966).

¹²⁷ A special court-martial is limited to trying non-capital cases and its punitive powers are limited to a maximum six months confinement, a bad conduct discharge, and lesser punishments. UCMJ, art. 19. However, often sentences tried by special courts-martial are, under the UCMJ, punishable by one year or more of confinement and a dishonorable discharge. The misdemeanor rationalization for allowing non-lawyer counsel therefore only applies if a misdemeanor is defined, not by statute, but by the powers of the court hearing the case or, in military reality, by the referral powers of a convening authority.

¹²⁸ See *e.g.*, *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962).

¹²⁹ See generally, S. Ulmer, *MILITARY JUSTICE AND THE RIGHT TO COUNSEL* (1970).

¹³⁰ 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

philosophy. Judge Quinn subsequently stated that a "constitutional identity" exists between military and civilian law concerning the right to confrontation.¹³¹ However, in protecting the right to confrontation the Court has given some strained constructions to Manual and Codal provisions.¹³² Article 49 provides that an "officer" may be designated to represent an accused at the taking of a deposition but the Court of Military Appeals qualified the provision by requiring legally qualified representation if the deposition was to be used in a general court-martial.¹³³ In *Jacoby* Judge Ferguson "reinterpreted" Article 49 to forbid the unconsented use of written interrogatories at trial in order to avoid a conflict with the Sixth Amendment.¹³⁴ In advancing the right to counsel at the taking of a deposition the Court's primary concern was the preservation of an effective right to confrontation.¹³⁵ The Court has been fairly strict in requiring the government to make a showing of the actual inability or

¹³¹ *United States v. Penn*, 18 U.S.C.M.A. 194, 198, 39 C.M.R. 194, 198 (1969).

¹³² For a pre-*Jacoby* examination of the right to confrontation and a discussion of the relevant military interests in liberal deposition rules see Everett, *The Role of the Deposition in Military Justice*, 7 MIL. L. REV. 131 (1960).

¹³³ *United States v. Drain*, 4 U.S.C.M.A. 646, 16 C.M.R. 220 (1954) (the Court reasoned that Congress in granting a right to qualified counsel in general courts-martial under Article 27(b) could not have intended to dilute the right in Article 49).

¹³⁴ 11 U.S.C.M.A. 428, 433, 29 C.M.R. 244, 249. Judge Ferguson noted that cross-interrogatories framed on the basis of prosecution inquiries were inadequate to preserve the opportunity to personally question the witness. Judge Latimer (and formerly Judge Brosman in Sutton) viewed the result in *Jacoby* as declaring a part of the UCMJ unconstitutional, however, the majority labeled the decision "the correct and constitutional construction of the Article in question" disavowing the express declaration of unconstitutionality. Whatever the characterization of the decision it did substantially modify previous practices by the application of the Sixth Amendment right to confrontation.

¹³⁵ *United States v. Donati*, 14 U.S.C.M.A. 235, 34 C.M.R. 15 (1963) (deposition inadmissible where taken after denial of continuance to obtain civilian counsel); *United States v. Brady*, 8 U.S.C.M.A. 456, 24 C.M.R. 266 (1957) (deposition inadmissible as officer accused had never seen or consulted with accused and accused's appointed counsel was prevented from attending deposition taking); *United States v. Miller*, 7 U.S.C.M.A. 23, 21 C.M.R. 149 (1956) (deposition inadmissible where accused absent; his desires as to counsel not known; and military counsel had not previously consulted with accused). However, where the accused was present with a qualified counsel there was no abuse of discretion in denying a continuance for deposition taking to secure military counsel see *United States v. Johnson*, 20 U.S.C.M.A. 359, 43 C.M.R. 199 (1971).

refusal of a witness to testify¹³⁶ and has rejected the 100 mile rule standing alone as justification for the use of depositions or former testimony of servicemen.¹³⁷

In the latest of a series of decisions protecting the right of compulsory process Judge Ferguson stated:

It will suffice for the purpose of the opinion to restate that the accused's right to compel the attendance of witnesses in his behalf, guaranteed by the Sixth Amendment to the Constitution, is additionally secured by Article 46 . . . which provides in part: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."¹³⁸

However, it is arguable that Article 46 represents a subtraction from, not an addition to, the Sixth Amendment. Under the regulations prescribed by the President, the defense counsel must apply through the trial counsel to the convening authority for the procurement of witnesses showing that the testimony is material and necessary.¹³⁹ If a request for a witness is denied by a convening authority, the request may be renewed by motion at trial. On appellate review the standard for determining an abuse of discretion is not clear though prejudice may result from a denial if the testimony of a requested witness goes to "the core of the defense."¹⁴⁰ The denial of character witnesses may also be an abuse of discretion.¹⁴¹ In *United States v. Sears*

¹³⁶ Insufficient justification see e.g., *United States v. Jones*, 21 U.S.C.M.A. 215, 44 C.M.R. 269 (1972); *United States v. Gaines*, 20 U.S.C.M.A. 557, 43 C.M.R. 397 (1971) (where departure of two witnesses from Vietnam "was effectuated by the Government and for its convenience"); *United States v. Johnson*, 14 U.S.C.M.A. 75, 33 C.M.R. 287 (1963); *United States v. Daniels*, 11 U.S.C.M.A. 23, 28 C.M.R. 276 (1959); *United States v. Mulvey*, 10 U.S.C.M.A. 242, 27 C.M.R. 316 (1959); *United States v. Dyche*, 8 U.S.C.M.A. 430, 24 C.M.R. 240 (1957); however, even if insufficient justification it may not be prejudicial error if no fair risk that it influenced court, see *United States v. Hodge*, 20 U.S.C.M.A. 412, 43 C.M.R. 252 (1971). Sufficient justification see e.g., *United States v. Burrows*, 16 U.S.C.M.A. 94, 36 C.M.R. 250 (1966); *United States v. Ciarletta*, 7 U.S.C.M.A. 606, 23 C.M.R. 70 (1957).

¹³⁷ *United States v. Davis*, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970); *United States v. Howard*, 17 U.S.C.M.A. 163, 37 C.M.R. 426 (1967); *United States v. Obligation*, 17 U.S.C.M.A. 36, 37 C.M.R. 300 (1967).

¹³⁸ *United States v. Sears*, 20 U.S.C.M.A. 380, 383, 43 C.M.R. 220, 223 (1971).

¹³⁹ MCM, para 115.

¹⁴⁰ *United States v. Thornton*, 8 U.S.C.M.A. 446, 450, 24 C.M.R. 256, 260 (1957). See also *United States v. Davis*, 19 U.S.C.M.A. 217, 41 C.M.R. 17 (1970) (100 mile rule alone not justification for denial of request).

¹⁴¹ *United States v. Sears*, 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971); *United States v. Foreman*, 18 U.S.C.M.A. 249, 39 C.M.R. 249 (1969); *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964). Denial

a convening authority's refusal to comply with the order of a military judge to secure the attendance of two character witnesses and the subsequent capitulation by the military judge caused the Court of Military Appeals to dismiss the charges.¹⁴² If a witness request is granted it should be noted that the subpoena power of a court-martial reaches to "any part of the United States, or the Territories, Commonwealths, and possessions."¹⁴³ Although the Manual provisions hardly seem designed to insure an impartial and equal opportunity to secure witnesses, the Court of Military Appeals is sensitive to violations of the constitutional right to compulsory process.¹⁴⁴

5. *The Right to be Secure from Unreasonable Searches and Seizures.*

This constitutional guarantee was not incorporated in the Uniform Code of Military Justice but the rules of evidence promulgated under Article 36 contain provisions for the exclusion of illegally obtained evidence.¹⁴⁵ The Manual provisions generally parallel federal court principles with the significant exceptions for the role of a commanding officer and the absence of the need for warrants.¹⁴⁶ In the military a commanding officer, not an independent magistrate, may authorize a search. A recent change in Army regulations authorizes military judges to issue search warrants upon probable cause with respect to military persons and property located within military jurisdic-

of witnesses to testify in extenuation and mitigation may also be reversible error see *United States v. Manos*, 17 U.S.C.M.A. 10, 37 C.M.R. 274 (1967).

¹⁴² 20 U.S.C.M.A. 380, 43 C.M.R. 220 (1971).

¹⁴³ UCMJ, art. 46.

¹⁴⁴ For conflicting views on the efficacy of field practices in obtaining witnesses compare *Glasser, Justice and Captain Levy*, 12 COLUM. L. F. 46, 47 (1969) with *Moyer, Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105, 123-25 (1970). The problems encountered by defense counsel in obtaining expert witnesses are discussed in 3 THE ADVOCATE 34 (1971). Space does not permit a summary of military law concerning discovery but again for contrasting views compare *Moyer, supra.* at 114-17 with *Sherman, Civilianization*, *supra* note 2, at 73-76; See also *Melnick, The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint*, 29 MIL. L. REV. 1 (1965); *Saunders, Proposed Changes in Military Discovery*, 10 AM. CRIM. L. REV. 81 (1971); *West, The Significance of the Jencks Act in Military Law*, 30 MIL. L. REV. 83 (1965).

¹⁴⁵ MCM, para 152.

¹⁴⁶ See *United States v. Dupree*, 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952) (notes that the policy for the Manual rule lies in the Fourth Amendment and thus the Court looked to federal court decisions).

tion.¹⁴⁷ Consistent with the development of the Court's constitutional philosophy early opinions avoided the question of the applicability of the Fourth Amendment to military searches and seizures although relying heavily on federal court analogies.¹⁴⁸ Eventually it was proclaimed in *United States v. Gebhart*:

A search founded upon mere suspicion is illegal and the fruits thereof inadmissible. . . . To hold otherwise would require us to deny to military personnel the full protections of the United States Constitution itself. This, neither we, not the Congress, nor the Executive, nor any individual can do.¹⁴⁹

The applicability of the Fourth Amendment has since been continually reaffirmed by all judges of the Court.¹⁵⁰ Although disagreement may arise over the wisdom of a particular determination of probable cause,¹⁵¹ the reliability of informants,¹⁵² or the sanctioning of administrative inventories¹⁵³ and "shake-down inspections"¹⁵⁴ because of alleged military necessity, it is undisputed that the Court of Military Appeals operates under

¹⁴⁷ Chapter 14, change 8, Army Reg. No. 27-10 (7 September 1971). The anticipated change was discussed in McNeill, *Recent Trends in Search and Seizure*, 54 MIL. L. REV. 83, 94-102 (1971). The Court of Military Appeals had previously suggested the need for written authorizations in *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

¹⁴⁸ *E.g.*, *United States v. Rhodes*, 3 U.S.C.M.A. 73, 11 C.M.R. 73 (1953); *United States v. Dupree*, 1 U.S.C.M.A. 665, 5 C.M.R. 93 (1952); *United States v. Florence*, 1 U.S.C.M.A. 620, 5 C.M.R. 48 (1952).

¹⁴⁹ 10 U.S.C.M.A. 606, 610, 28 C.M.R. 172, 176 (1959).

¹⁵⁰ *E.g.*, *United States v. Fleener*, 21 U.S.C.M.A. 174, 44 C.M.R. 228 (1972) (Judge Duncan); *United States v. Alston*, 20 U.S.C.M.A. 581, 583, 44 C.M.R. 11, 13 (1971) (Chief Judge Darden); *United States v. Garlech*, 15 U.S.C.M.A. 362, 35 C.M.R. 334 (1965) (Judge Kilday); *United States v. Ross*, 13 U.S.C.M.A. 432, 32 C.M.R. 432 (1963) (Judge Quinn); *United States v. Vierra*, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963) (Judge Quinn).

¹⁵¹ *E.g.*, *United States v. Jeter*, 21 U.S.C.M.A. 208, 44 C.M.R. 262 (1972).

¹⁵² *E.g.*, *United States v. Sparks*, 21 U.S.C.M.A. 134, 44 C.M.R. 188 (1971).

¹⁵³ *E.g.*, *United States v. Welch*, 19 U.S.C.M.A. 134, 41 C.M.R. 134 (1969) (inventory of a bag on a motorcycle as detained property); *United States v. Kazmierczak*, 16 U.S.C.M.A. 594, 37 C.M.R. 214 (1967) (inventory of an accused's personal effects in barracks after his confinement in post stockade held lawful search; Judge Ferguson dissented on use of evidence as good faith of actors substituting for probable cause requirement).

¹⁵⁴ A shakedown search or inspection is an administrative action supposedly designed to maintain efficiency and discipline within a command. The line between an inspection for administrative or training reasons or based on probable cause and a "fishing expedition" may be exceedingly thin. See *e.g.*, *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1966). See also Hamel, *Military Search and Seizure—Probable Cause Requirement*, 39 MIL. L. REV. 41, 74-82 (1966); *United States v. Harman*, 12 U.S.C.M.A. 180, 30 C.M.R. 180 (1961). An interesting comment on these kinds of searches is Hunt, *Inspections*, 54 MIL. L. REV. 225 (1971).

the strictures of the Fourth Amendment and Supreme Court guidelines.¹⁵⁵

6. The Right to a Public and Speedy Trial.

Both of these constitutional safeguards have been upheld by the Court of Military Appeals. While the right to a public trial has formed the basis for few decisions,¹⁵⁶ the right to a speedy trial has been a fertile ground for adjudication by the Court. Citing the Sixth Amendment and relevant Codal provisions¹⁵⁷ the Court declared in *United States v. Hounshell*:

Unquestionably therefore the right to a speedy trial is a substantial right. And, if it is denied to the accused, the trial judge can redress the wrong by dismissing the charges.¹⁵⁸

The Court later placed the burden on the government to display due diligence in bringing a case to trial.¹⁵⁹ Literal compliance with statutory provisions was not required¹⁶⁰ as cases were judged in light of the nature of the charges and the attendant difficulties of preparing for trial.¹⁶¹ During the early and mid-sixties doubt on appeal was often resolved in favor of the ac-

¹⁵⁵ See generally, David, "Mere Evidence" Rule in Search and Seizure, 35 MIL. L. REV. 101 (1967); Hamel, *supra* note 154; Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.S.C.L.A. L. REV. 1240, 1253-1258 (1968); Webb, *Military Searches and Seizures—The Development of a Constitutional Right*, 26 MIL. L. REV. 1 (1964). For another example of the Court of Military Appeals reaching a narrower result on a constitutional issue before a Supreme Court decision compare *Chimel v. California* 395 U.S. 752 (1969) with *United States v. Goldman*, 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1969).

¹⁵⁶ *McDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970) (Article 32 not a trial within the Sixth Amendment and thus not required to be public); *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956) (a convening authority's order to close a trial was unlawful as not required for security reasons). Public trials are the rule in the military but for one exception see *Sherman, Dissenters and Deserters*, 160 NEW REPUBLIC, Jan. 6, 1968 at 25 (describes closing of court-martial at Fort Sill, Oklahoma to anti-war protestors). See MCM, para 53(3).

¹⁵⁷ "... When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." UCMJ, art. 10.

"... When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay." UCMJ, art. 33.

¹⁵⁸ 7 U.S.C.M.A. 3, 6, 21 C.M.R. 129, 132 (1956).

¹⁵⁹ *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

¹⁶⁰ *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965).

¹⁶¹ *E.g.*, *United States v. Brown*, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962).

cused but the trend has been reversed with a greater burden placed upon the defense to show prejudice or the unreasonableness and oppressiveness of the government's actions.¹⁶² While finding no speedy trial violation despite 196 days' pretrial confinement and 10 months between date of offense and trial, the Court of Military Appeals set forth new standards for cases following the date of the decision in *United States v. Burton*:

[I]n the absence of defense requests for continuance, a presumption of an Article 10 violation will exist when pretrial confinement exceeds three months. In such cases, this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed.

Similarly, when defense requests a speedy disposition of the charges the Government must respond to the request. . . . A failure to respond to the request for a prompt trial or to order such a trial may justify extraordinary relief.¹⁶³

Burton not only established new standards whose meanings have yet to be tested but also again displayed the differences in constitutional perspective among the judges. Chief Judge Darden strongly implied that the Sixth Amendment was not relevant to military law.¹⁶⁴ While not disavowing the application of the constitutional guarantee, the adherents to the *Jacoby-Tempia* school in their own speedy trial opinions also have had little need to draw on the strength of the Sixth Amendment for support because of the strong statutory language and rich body of Court of Military Appeals precedents.¹⁶⁵

¹⁶² *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971); *United States v. Marin*, 20 U.S.C.M.A. 432, 43 C.M.R. 272 (1971); *United States v. Ray*, 20 U.S.C.M.A. 331, 43 C.M.R. 171 (1971); *United States v. Pierce*, 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970); *United States v. Przybycien*, 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969); *United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969). See, *Whatever Happened to Speedy Trial?*, THE ADVOCATE, November, 1970, at 1.

¹⁶³ 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971).

¹⁶⁴ *Id.*, at 117-118, 44 C.M.R. at 171-72.

¹⁶⁵ *E.g.*, *United States v. Hubbard*, 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971). For general discussion of speedy trial in the military see Tichenor, *The Accused's Right to a Speedy Trial in Military Law*, 52 MIL. L. REV. 1 (1971). Information released by the Clerk of the Court for the U.S. Army Judiciary in 1972 shows that a military accused in Jul-Dec., 1971 was brought to trial by general court-martial an average of 81 days after arrest or restraint; an average of 59 days elapsed for trial by a special court-martial empowered to adjudge a bad conduct discharge. In that these figures represent the more serious offenses it may be assumed that other military accused are brought to trial in less time. Indeed, a study done by this author of personnel belonging to the Special Processing Detachment, Fort Devens, Mass. in Jul-Aug., 1969 indicated command concern about pretrial confinement sometimes forced an accused to trial too quickly with an ill-prepared defense.

7. The Right to Bail.

In 1957 the Court of Military Appeals noted that "in the military bail is not available."¹⁶⁶ The Chief Judge later skirted the issue in *United States v. Wilson*¹⁶⁷ by observing that a military accused in pretrial confinement has the remedy of moving for a speedy trial or of filing charges under Article 98 against a person who improperly confines an accused. In addition to these relatively ineffective remedies the Court has also urged the filing of a complaint under Article 138.¹⁶⁸ In *Levy v. Resor*¹⁶⁹ the Court of Military Appeals denied a petition for *habeas corpus* noting that the Eighth Amendment does not require post-trial bail and that the military has no statutory provision for post-trial bail. The determination of pretrial and post-trial restraint has been and remains solely the function of command discretion.¹⁷⁰ The Court of Military Appeals will review the imposition of restraint for an abuse of discretion but such review has been of little assistance to one incarcerated in a military stockade or prison.¹⁷¹ It may very well have been the lack of judicial

¹⁶⁶ *United States v. Hangsleben*, 8 U.S.C.M.A. 320, 323, 24 C.M.R. 180, 183 (1957).

¹⁶⁷ 10 U.S.C.M.A. 327, 329, 27 C.M.R. 411, 413 (1959).

¹⁶⁸ *Tuttle v. Commanding Officer*, 21 U.S.C.M.A. 229, 45 C.M.R. 3 (1972); *Font v. Seamans*, 20 U.S.C.M.A. 387, 43 C.M.R. 227 (1971); *Dale v. United States*, 19 U.S.C.M.A. 254, 21 C.M.R. 254 (1970). "Any member of the armed forces who believes himself wronged by his commanding officer and who upon due application to that commander is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. [That officer] shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon." UCMJ, art. 138. Such action is time consuming and of uncertain results. For one look at the provision see *Nemrow, Complaints of Wrong Under Article 138*, 2 MIL. L. REV. 43 (1958). The author can find no prosecution under Article 98 for unlawfully confining a person although many cases may be cited of illegal confinement. (See dissenting opinion of Judge Ferguson in *United States v. Ray*, 20 U.S.C.M.A. 331, 43 C.M.R. 171 (1971).)

¹⁶⁹ 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); accord, *Green v. Wylie*, 20 U.S.C.M.A. 391, 43 C.M.R. 231 (1971).

¹⁷⁰ Pretrial restraint is governed by UCMJ, arts. 9, 10, 13, 33; MCM, para 17-22; and various Department and command directives. Post-trial restraint imposed by a court-martial may be deferred in the sole discretion of a convening authority, UCMJ, art. 57(d); MCM, para 88(f).

¹⁷¹ No abuse found in *Tuttle v. Commanding Officer*, 21 U.S.C.M.A. 229, 45 C.M.R. 3 (1972); *Green v. Wylie*, 20 U.S.C.M.A. 391, 43 C.M.R. 231 (1971); *Conmy v. United States*, 20 U.S.C.M.A. 282, 43 C.M.R. 122 (1971); *Mitchell v. Laird*, 20 U.S.C.M.A. 195, 43 C.M.R. 35 (1970); *United States v. Daniels*, 19 U.S.C.M.A. 518, 42 C.M.R. 120 (1970); *Smith v. Coburn*, 19 U.S.C.M.A. 291, 41 C.M.R. 291 (1970); *Dexter v. Chaffee*, 19 U.S.C.M.A. 289, 41 C.M.R. 289 (1970); *Kline v. Resor*, 19 U.S.C.M.A. 288, 41 C.M.R.

57 MILITARY LAW REVIEW

control over confinement that led the Court of Military Appeals to develop its strict speedy trial standards,¹⁷² to be sensitive to the treatment of unsentenced prisoners,¹⁷³ and to require adherence to command policies for pretrial confinement.¹⁷⁴ However, the lack of bail in the military with the reliance on command rather than judicial discretion represents one of the most glaring constitutional voids in military justice.¹⁷⁵

8. *First Amendment Rights.*

Surprisingly few cases involving First Amendment rights have been decided by the Court of Military Appeals. With regard to the applicability of the First Amendment the Court has stated:

The right to believe in a particular faith or philosophy and the right to express one's opinions or to complain about real or imaginary wrongs are legitimate activities in the military community as much as they are in the civilian community. . . . If the statements and the intent of the accused, as established by the evidence, constitute no more than commentary as to the tenets of his faith

288 (1970); *Horner v. Resor*, 19 U.S.C.M.A. 285, 41 C.M.R. 285 (1970); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); however, abuse found in revocation of previous commander's deferment in *Collier v. United States*, 19 U.S.C.M.A. 511, 42 C.M.R. 133 (1970).

¹⁷² See *United States v. Wilson*, 10 U.S.C.M.A. 327, 27 C.M.R. 411 (1959).

¹⁷³ The "commingling of sentenced and unsentenced prisoners" was held unlawful and led to an order to reassess sentences in *United States v. Pringle*, 19 U.S.C.M.A. 324, 41 C.M.R. 324 (1970); *United States v. Nelson*, 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969); *United States v. Bayhand*, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956). Harsh confinement conditions made a confession inadmissible in *United States v. O'Such*, 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1967).

¹⁷⁴ The Court ordered a reassessment of a sentence where it found the pretrial confinement of an accused improper under his division's regulations see *United States v. Jennings*, 19 U.S.C.M.A. 88, 41 C.M.R. 88 (1969).

¹⁷⁵ Various military regulations (army, division, post) have, however, injected staff judge advocates into the approval and supervising of pretrial confinement. A program establishing a JAGC Magistrate to monitor pretrial confinement was initiated by the U.S. Army in Europe during 1971. See *ARMY LAWYER*, May 1972 at 3. Nevertheless, a system which can lead to such a wide disparity in pretrial and post-trial restraint as demonstrated by the treatment of Lt. Calley versus the treatment of a Lt. Howe or Cpt. Levy (or the disparity between officers and enlisted men in general) needs critical reevaluation and change. The situation is made all the egregious when it is realized that time spent in pretrial confinement does not necessarily reduce adjudged confinement and that pretrial confinement leading to a conviction and time in confinement as a result of a conviction must be made up to satisfy one's service obligation. (10 U.S.C. sec. 972) For a thorough consideration of the effects of confinement, the legitimate concerns of military necessity, and suggestions for judicialization of military confinement procedures see *Boller, Pretrial Restraint in the Military*, 50 MIL. L. REV. 71 (1970). For an examination of post-trial release power see *Brant, Deferment of Confinement—An Analysis*, 25 JAG J. 47 (1970) (observes that military right to post-trial release much more restrictive than civilian practice).

or declarations of private opinion as to the social and political state of the United States, he is guilty of no crime.¹⁷⁶

Religious scruples were rejected as a defense to an order to put on a uniform¹⁷⁷ and the judges have agreed with the prevailing view that conscientious objection is not a constitutional right but a status conferred by legislative grace.¹⁷⁸ In the only other religious related cases the Court held arbitrary and unreasonable a regulation imposing a six-month waiting period for marriage by servicemen in the Philippines¹⁷⁹ but later sustained convictions when an individual did not follow the requirement of having an interview with a chaplain before marrying a foreign national overseas.¹⁸⁰

The making of disloyal statements and the disobedience of orders comprise the usual context for free speech cases with the Court having little trouble sustaining these convictions notwithstanding the questionable constitutionality of the punitive articles under which they were obtained.¹⁸¹ While the Court has

¹⁷⁶ *United States v. Daniels*, 19 U.S.C.M.A. 529, 532, 42 C.M.R. 131, 134 (1970).

¹⁷⁷ *United States v. Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969).

¹⁷⁸ *United States v. Stewart*, 20 U.S.C.M.A. 272, 275, 43 C.M.R. 112, 115 (1971). In *United States v. Lenox*, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972) Judge Duncan joined the Chief Judge in rejecting the concept that an erroneous denial of a conscientious objector application may be utilized as a defense to a disobedience of a subsequent related order overruling *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

¹⁷⁹ *United States v. Nation*, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958).

¹⁸⁰ *United States v. Smith*, 12 U.S.C.M.A. 564, 31 C.M.R. 150 (1961); *United States v. Wheeler*, 12 U.S.C.M.A. 387, 30 C.M.R. 387 (1967) (majority, per Quinn, upheld regulation as (1) not religiously related (2) proper exercise of command interest in health and well being of military community; dissent, Judge Ferguson, found regulation unlawful stating "no real connection has been shown between the requirement that an enlisted man secure the permission of his commanding officer to marry and the lawful scope of the Navy's power to regulate the conduct of its personnel.") The majority rebut was questioned in Foreman, *Religion, Conscience, and Military Discipline*, 52 MIL. L. REV. 77, 90-91 (1971).

¹⁸¹ The effectiveness of a military organization depends on willing obedience to orders and thus speech tending to undermine discipline is expressly prohibited in the UCMJ, art. 89 (disrespect to an officer); art. 91 (disrespect to a noncommissioned officer); arts. 82, 94 (solicitation of desertion or mutiny); art. 117 (use of provoking words or gestures). Obviously offenses such as improper use of countersign, art. 101; forcing a safeguard, art. 103; communicating with enemy, art. 104(2); misconduct as a prisoner, art. 105 are also justifiable limitations on speech. However, speech prosecutions under art. 88 (contemptuous words against public officials and the general articles, arts. 133, 134, as conduct unbecoming an officer and disloyal statements require close scrutiny and a careful balancing of interests. For varying views on the relevant interests and the appropriate balance see Brown, *Must the Soldier Be a Silent Member of Our Society*, 43 MIL. L. REV. 71 (1969); Boye, *Freedom of Speech and the Military*, 1966 UTAH L.

57 MILITARY LAW REVIEW

at least proclaimed the applicability of the First Amendment, it has not displayed a willingness to question the actual needs of military discipline.¹⁸² The conviction of a young lieutenant for carrying a sign in an anti-war demonstration off base while dressed in civilian clothes was affirmed with the following rough application of the "clear and present danger" test:

We need not determine whether a state of war presently exists. We do judicially know that hundreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, into our armed forces. That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument.¹⁸³

Three years later, although reversing the convictions of two

REV. 240; Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the UCMJ*, 81 HARV. L. REV. 1697 (1968); Lewis, *A Soldier's Right to Freedom of Speech*, 41 MIL. L. REV. 55 (1968); Sherman, *The Military Court's and Servicemen's First Amendment Rights*, 22 HASTINGS L. J. 325 (1971); Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957); Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357, 1968 (answering no); *Dissenting Servicemen and the First Amendment*, 58 GEO. L. J. 534 (1970). It should be noted that the discussion in the text pertains to First Amendment issues that are part of criminal proceedings. The Court has not assumed the power to enjoin alleged violations of First Amendment rights. Responding to a recent petition seeking relief the Court pointed to Article 138 as the appropriate military remedy. See *Fond v. Seamans*, 20 U.S.C.M.A. 387, 43 C.M.R. 227 (1971).

¹⁸² See Johnson, *Military Discipline and Political Expression: A New Look at an Old Bugbear*, 6 HARV. CIVIL RIGHTS—CIVIL LIB. L. REV. 525 (1971) (argues that military should bear burden of showing compelling need in curtailing first amendment freedoms noting that available data suggests that soldier's political beliefs have minimal effect on performance and a free exchange of ideas better insulates soldiers from brainwashing and better prepares them for complex responsibilities of modern warfare).

¹⁸³ *United States v. Howe*, 17 U.S.C.M.A. 165, 173-74, 37 C.M.R. 429, 437-38 (1967). Lt. Howe's sign read "Lets Have More Than A Choice Between Petty Ignorant Facists in 1968" and "End Johnson's Facist Aggression in Viet Nam." He was convicted of "conduct unbecoming an officer," Article 138, and "using contemptuous words against the President of the United States," Article 88. Lt. Howe is the only person convicted under this section since the UCMJ was enacted. For background on Article 88 and a discussion of this case see Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the UCMJ*, 81 HARV. L. REV. 1697 (1968); Sherman, *The Military Court's and Servicemen's First Amendment Rights*, 22 HASTINGS L. J. 325 (1971) [hereinafter cited as Sherman, *First Amendment Rights*].

dissident black marines on an instructional error,¹⁸⁴ the Court did not display any increased sophistication in balancing First Amendment rights with military necessity. The Court further narrowed the definition of "disloyalty to the United States" in *United States v. Gray*¹⁸⁵ but found disloyalty in a short note left by the accused in the unit's log book before absenting himself without leave.¹⁸⁶ One of the more critical analyses of the performance of military tribunals on First Amendment issues found their opinions disappointing and suggested that only federal courts rather than military courts "offer much hope in the immediate future for altering the present limitations on servicemen's First Amendment rights."¹⁸⁷ Service in the military does indeed require a different balancing of interests than is required in civilian life but the punishment of young officers and enlisted men for expressing widely held beliefs reflects a dubious balance.¹⁸⁸

¹⁸⁴ *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970); *United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). However, "totality of the instructions" were found satisfactory in *United States v. Priest*, 21 U.S.C.M.A. 64, 44 C.M.R. 118 (1971). For a discussion of these cases see Sherman, *First Amendment Rights*, 353-371.

¹⁸⁵ *United States v. Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970) (the Court held that disloyalty to the United States is not manifested by general criticism of the military and foreign policy).

¹⁸⁶ The Court, focusing on the placement of the note in a public place and construing the United States as the intended recipient of the "fight" held the following statement disloyal.

Dear fellow member's of crash crew

As I write this I have but a few hours left on this island. Surely you know why, but where did I go? I'm not to sure right now but I have hopes of Canada, then on to Sweden, Turkey, or India.

It sounds silly to you? Let me ask you this: do you like the Marine Corps? The American policy or foreign affairs.

Have you ever read the constitution of the United States. IT'S A FARCE. Every thing that is printed there is contradicted by "amendments:" is this fair the U.S. people? I believe not. Why set back and take these unjust Rules and do nothing about it. If you do nothing will change.

This is what I'm doing. *A Struggle for Humanity*. But it takes more than myself. We must all fight.

/s/ Mr. Gray

¹⁸⁷ Sherman, *First Amendment Rights*, 373.

¹⁸⁸ In addition to the cases discussed in the text and notes above, there has been one other significant First Amendment case. The Court in 1954 reviewed the conviction of a Lt. Col. who had violated certain orders and military censorship regulations by publishing a book about the Korean War which included criticisms of General MacArthur. Affirming only one technical violation out of five specifications, the judges, with varying emphasis, accepted the applicability of the First Amendment. *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). There have been some other cases dealing with First Amendment rights in a more peripheral manner. An order to a sergeant not to talk to anyone about an investigation involving his wife was held too vague and indefinite in *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958). The conviction of a soldier for extortion and communicating a threat was set aside where it was ap-

C. A CRITIQUE

There are, to be sure, decisional weaknesses in the handling of constitutional issues by the Court of Military Appeals. As the previous section illustrates, reasonable men will differ over the appropriate result in a particular case. The previous section was intended, however, not simply to point to those instances where a different result could have been reached or may have been desirable but to provide a basis for understanding the decision making process which led to those results. In assessing the constitutional performance of the Court, it is important to recognize under which constitutional philosophy a particular decision was rendered. The developmental aspect and disunity in the Court's constitutional philosophy is often overlooked, frequently causing faulty analysis. Generalized comment on the Court and the Constitution may be misleading unless citations are made with regard to the date of decision, the author judge, and the nature of the right involved. It may nevertheless be fairly observed that whether under a *Clay-Sutton* or *Jacoby-Tempia* majority, the Court of Military Appeals has rarely decided a "constitutional case" without reliance upon a UCMJ or Manual provision. The UCMJ, while theoretically subordinate to the Constitution, has been and remains the principal touchstone for adjudication by the Court. Manual provisions are similarly influential as they provide the decisional framework for constitutional questions. In reality, the Constitution has been a supplementary rather than primary source of decision making. Individual rights have been best protected by the Court of Military Appeals where statutory provisions are the strongest¹⁰⁹ and least protected where there is little or no statutory guidance.¹⁰⁰ Undoubtedly the influence of the Bill of Rights, spiritual as well as literal, coupled with the effort to fulfill congressional intent to equalize

parent that the charges stemmed from the soldier complaining about harassment he had received for having written his Senator about the poor food and living conditions. *United States v. Schmidt*, 16 U.S.C.M.A. 57, 36 C.M.R. 213 (1966). Without any discussion of the First Amendment the Court in the 1950's affirmed convictions for defiling the flag, *United States v. Cramer*, 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957), and for the disloyal conduct and speech of *United States v. Fleming*, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957); *United States v. Olsen*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957); *United States v. Batchelor*, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

¹⁰⁹ Self-incrimination, art. 31 (except for *Kirsch* note 197 *infra*); speedy trial, arts. 10 and 33; right to compulsory process and confrontation, arts. 46 and 49 (COMA has been strongest in placing limitations on the use of depositions see *supra* notes 130-44 and text). (The Court has embraced the 4th Amendment in the absence of a statutory provision.)

¹⁰⁰ First amendment rights see notes 176-188 *supra*; pretrial restraint see notes 166-175 *supra*.

military and civilian rights, engendered decisions such as *Minnifield*,¹⁹¹ *Drain*,¹⁹² and *Tomaszewski*¹⁹³ which gave expanded meanings to particular words or phrases in the Code. In *Jacoby*¹⁹⁴ and *Tempia*¹⁹⁵ the utilization of constitutional principles did lead to results not dictated by the UCMJ but in other cases like *Culp*,¹⁹⁶ *Kirsch*,¹⁹⁷ and *Howe*,¹⁹⁸ constitutional principles seemingly had significantly less impact. The explanation for their differences, it is submitted, may be found in the flaws of the two basic schools of constitutional philosophy which created curious and inconsistent results and in structural more than judgmental weaknesses in the Court.

The *Clay-Sutton* perspective, supported by pre-UCMJ military justice theory and practice, encountered early difficulty in its application by the Court of Military Appeals. Interpreting the provisions of the UCMJ according to what was perceived as congressional intent to confer equal right on servicemen, the judges found themselves outstripping protections the Supreme Court declared constitutional.¹⁹⁹ This curiosity can be regarded as incidental to the concept of military due process which may in a given instance provide greater protection for an accused than constitutional due process. Such rationalization is somewhat disingenuous as being post-hoc and a denial of the very purpose of judicial activity. A strict adherence to legislatively sifted constitutional rights is no longer tenable in view of Supreme Court dictum that certain constitutional rights apply in military tribunals.²⁰⁰ Thus, Chief Judge Darden has fashioned a

¹⁹¹ 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958) (gave expanded meaning to word "statement" in Article 31 in reconciling previous holdings that went beyond federal court holdings).

¹⁹² 4 U.S.C.M.A. 646, 16 C.M.R. 220 (1954) (interpreting words "commissioned officers" in article 49(a) was meaning qualified counsel if depositions were to be used in general courts-martial). See note 133 and text *supra*.

¹⁹³ 8 U.S.C.M.A. 266, 24 C.M.R. 76 (1957) (interpreted word "counsel" in Article 32 as legally qualified counsel). See note 102 and text *supra*.

¹⁹⁴ 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (forbidding use of written interrogatories over defense objection).

¹⁹⁵ 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (adding advice to counsel as part of warning requirement). See note 108 and text *supra*.

¹⁹⁶ 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) (not requiring qualified counsel to be detailed to special courts-martial). See notes 122-129 and text *supra*.

¹⁹⁷ 15 U.S.C.M.A. 54, 35 C.M.R. 56 (1964) (sustaining conviction of willful refusal to testify notwithstanding constitutionally questionable grant of immunity). See notes 76-79 and text *supra*.

¹⁹⁸ 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) (sustaining convictions under Articles 88 and 134 of Lt. who participated in off post non-duty hour anti-war demonstration). See note 183 *supra*.

¹⁹⁹ See notes 33-38 and text *supra*.

²⁰⁰ *Wade v. Hunter*, 336 U.S. 684 (1949) (strong implication that double jeopardy guarantee applies).

modified *Clay-Sutton* philosophy in which Congress may still filter some constitutional guarantees except those which the Supreme Court has deemed applicable or which have become ingrained into military law by the decisions of the Court of Military Appeals. Such an ad hoc approach is an obviously incomplete constitutional philosophy leaving to Supreme Court dictum the still unresolved question of the constitutional rights of those in the armed services. It distorts decision making by using civilian criminal justice as the conclusive constitutional paradigm whereas the military setting may allow or demand greater protection of individual rights as well as require necessary limitations.

The *applicability* of the Constitution to courts-martial has been often proclaimed by the *Jacoby-Tempia* majority and is generally accepted by military law practitioners and commentators. However, the meaning of that oft quoted phrase, "except those which are expressly or by necessary implication inapplicable," is not clear.²⁰¹ Under this majority philosophy the Court of Military Appeals produced the curious situation in which a military accused enjoyed a constitutional right to protection of counsel during critical pretrial stages²⁰² but stood to lose that lawyer if the case was subsequently referred to a special court-martial.²⁰³ If applicability means the *adoption* of constitutional rights enjoyed by civilians, then, analyzing the Court's decisions, it cannot be said that all constitutional rights are applicable to the military justice system. The right to bail must at least be added to the rights of indictment by grand jury and trial by petit jury as "expressly or by necessary implication inapplicable." The right against self-incrimination,²⁰⁴ the right to a public and speedy trial, the protection against double jeopardy, and the right to counsel,²⁰⁵ may be labeled applicable. Other constitutional rights may not be fully applicable: speech permissible by a civilian may

²⁰¹ The right to grand jury is expressly inapplicable as is the right to petit jury by historical implication. See notes 248, 249 *infra*. It has been suggested that "necessarily inapplicable" means not provided for at the time of the adoption of the Constitution. Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71, 102-04 (1970). This interpretation of the *Jacoby-Tempia* philosophy does explain the rationale employed by COMA in certain decisions but does not comport with the realities of military law in 1789 and does not explain the broad statements concerning the constitutional rights of servicemen by the *Jacoby-Tempia* proponents.

²⁰² *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

²⁰³ *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

²⁰⁴ Grants of immunity may be an exception see notes 76-79 and text *supra*.

²⁰⁵ The right to counsel may have been partially applicable until the Military Justice Act of 1968. See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) and notes 122-129 and text *supra*.

be punishable if uttered by a person in uniform; an often interested commanding officer, shakedown searches, and administrative inventories may dilute a serviceman's protection from unreasonable searches and seizures; UCMJ and Manual provisions may depreciate the practical vitality of an accused's right to confrontation and compulsory process. This concept of applicability, fostered by declarations that "Congress intended to confer equal rights" and "constitutional rights are not *ipso facto* lost on entrance into the armed services," invites static comparisons between military and civilian rights before criminal tribunals. While such comparisons are interesting they may only add to the misunderstanding and mistrust of military justice if they do not recognize and articulate the existence of an important additional variable in military law—the imponderable "military necessity."²⁰⁶

If applicability means the *utilization and employment* of constitutional principles in the decision making process then with the exceptions of grand jury, trial by jury, and bail, constitutional guarantees may be said to apply to the military. This applicability concept more accurately characterizes the relationship between the Constitution and courts-martial and describes what is in fact a principal function of the Court of Military Appeals—the balancing of individual rights and military necessity. In either form the concept of applicability, however, obfuscates the true character of and the real determinants in the adjudicative process of the Court. Merely declaring that something is applicable does not necessarily determine a given result particularly when it is the ever-changing yet enduring Bill of Rights which is being applied.

Because of heavy reliance on the Uniform Code of Military Justice by both schools of thought, it may appear difficult to discern a difference in results obtained under a *Clay-Sutton* or *Jacoby-Tempia* majority. There is at least one critical distinction best exemplified in the divergent interpretation of due process in the military. In considering the effects of delay in post trial review Chief Judge Darden drawing on *Clay* noted:

[The] issue needs further refinement to indicate its contemplation of a test under the standard of military, instead of Fifth Amendment, due process. Although this Court has declared that constitutional safeguards apply to military trials except insofar as they are made inapplicable expressly or by necessary implication . . .

²⁰⁶ Military necessity is an often used and undefined term. Generally it represents that which is essential to the successful fulfillment of the military mission (whatever that may be).

the Court has not held that the due process clause of the Fifth Amendment applies *ex proprio vigore* to appellate review of military trials.²⁰⁷

Judge Quinn, though concurring in the result, sharply responded:

... I am constrained to dissociate myself from the implication that military due process is isolated from, independent of, and something less than, constitutional due process. . . . In the area of due process, military law is not only consistent with constitutional due process but provides for "something more."²⁰⁸

Under the *Clay-Sutton* "incorporation theory" due process in the military is the sum of one's statutory and regulatory rights whereas under *Jacoby-Tempia* due process is statutory, regulatory and constitutional in nature. *Jacoby-Tempia* perceives, correctly in my opinion, the Bill of Rights as fully binding on the military inasmuch as it is an arm of the federal government. The future of constitutional law in the military lies in the full acceptance of and the extrapolation from this important premise.

The above-expressed dissatisfaction with the present state of constitutional law in the military should not be construed as wholesale disagreement with the decisions of the Court of Military Appeals. To make the observation that the Court is sensitive to congressional intent and relies primarily on the UCMJ does not alone provide sufficient basis to criticize its decision making.²⁰⁹ Reliance on legislative intent and statutory provisions is not surprising for a legislative court and, in fact, is sound judicial practice for any tribunal faced with constitutional questions.²¹⁰

²⁰⁷ *United States v. Prater*, 20 U.S.C.M.A. 339, 341-42, 43 C.M.R. 179, 181-2 (1971).

²⁰⁸ *Id.*, at 343, 43 C.M.R. at 183.

²⁰⁹ The Court was severely chastised in a recent article for failing congressional intent, selling out to the military establishment, and for not practicing what it preached in regard to the constitutional rights of servicemen. While correctly perceiving certain structural deficiencies in the Court that expose suffers from generality and historical nearsightedness. See Benson, *The United States Court of Military Appeals*, 3 TEXAS TECH L. REV. 1 (1971) [hereinafter cited as Benson]. For interesting background on this article see Anderson, *Pentagon Censures Lawyer-Colonel*, *The Washington Post*, October 11, 1971, at B 13.

²¹⁰ In a concurring opinion to *Ashwander v. TVA*, 297 U.S. 288 (1956), Justice Brandeis set forth seven general rules the Supreme Court had developed to avoid unnecessarily deciding constitutional questions:

1. Not passing upon the constitutionality of legislation in a friendly, non-adversary proceeding.
2. Not anticipating a question of constitutional law in advance of the necessity of deciding it.
3. Not formulating a rule of constitutional law broader than required by the facts to which it is to be applied.
4. Not passing upon a constitutional question if there is some other ground upon which the case may be disposed.

Had the judges totally ignored their statutory limitations and the legislative history of the UCMJ they would surely have lost credibility as a responsible appellate tribunal.²¹¹

It is noteworthy that the cases securing constitutional rights for the military accused not fairly inferable from the UCMJ are infrequent, follow Supreme Court leadership, and are not in direct conflict with the Code.²¹² Where there has been direct conflict with the Code an express overruling is either denied or unstated.²¹³ On the other hand the Court has not felt inhibited in declaring sections of the UCMJ constitutional.²¹⁴ This hesitancy

5. Not passing upon the validity of a statute unless complainant shows injury.

6. Not passing upon constitutionality of a statute at insistence of one who has availed himself of its benefits.

7. When an act of Congress is questioned ascertaining whether a constitutional construction is fairly possible even if a serious doubt of constitutionality is raised.

²¹¹ The Court's most violent and dangerous criticism has not come from contemporary critics of military justice but came from within the military establishment during its first decade owing to the Court's activism. See Willis at 91-92.

²¹² E.g., *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (in announcing new rules for guilty plea inquiries the Court was plainly influenced by Supreme Court decisions using the due process clause of the 14th Amend. to reverse convictions in state courts); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (expressly adopted *Miranda* ruling for military); *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959) (imposing fourth amendment requirement of probable cause on searches authorized by commanders); *United States v. Gunnels*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957) (securing right to consult with counsel during pretrial investigation).

²¹³ *United States v. Davis*, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970) (in ignoring the 100 mile rule in Art. 49(d) (1) by requiring a showing of actual unavailability for a military witness the majority rested on military due process making no mention of possible codal conflict); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (although forbidding use of written interrogatories over defense objection notwithstanding Art. 49 authorization, an express overruling was denied; see notes 43-45 and text *supra*).

²¹⁴ *Priest v. Koch*, 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970) (Art. 62(a) empowering convening authority to return motion not amounting to finding of not guilty to court for reconsideration); *United States v. Howe*, 17 U.S.C.M.A. 65, 37 C.M.R. 429 (1967) (Art. 88, using contemptuous words against President; Art. 133, conduct unbecoming an officer); *United States v. Monett*, 16 U.S.C.M.A. 179, 36 C.M.R. 335 (1966) (Art. 69, empowering JAG to send case not normally qualifying to a board of review and have certified to COMA); *United States v. Gallagher*, 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965) (Art. 67(b) (1), automatic appeal for general or flag officers); *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964) (Art. 134, conduct prejudicial to good order and discipline; intentionally jumping into sea from an aircraft carrier was the conduct punished); *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1968) (Art. 27(c), no right to qualified counsel in special court-martial). See also jurisdiction cases note 220 *infra*.

to overrule the constitutional judgments of Congress has led to some creative interpretation of legislative intent and some opinions of dubious rationale. The awkwardness of invalidating a section of the UCMJ of which the Court is a part probably explains some of this reluctance.²¹⁵ Two of the seven judges that have served on the Court have stated that the judgment of Congress could not be reversed.²¹⁶ The late Judge Kilday expressed reticence to make any decision which would deprive the Supreme Court of its jurisdiction to rule on the constitutionality of federal statutes.²¹⁷ Chief Judge Darden places heavy reliance on the UCMJ as the source of due process rather than the Fifth Amendment, manifesting the unlikelihood of his questioning the judgment of Congress on constitutional questions.²¹⁸ The members with the longest service, Judges Ferguson and Quinn, have repeatedly proclaimed the primacy of the Constitution although they have not yet found it necessary or formed a majority to expressly invalidate any section of the Code. Whatever the reason, this reluctance, coupled with the inadequacy of federal court review under the "full and fair" consideration test, has meant that the UCMJ has been virtually immune from judicial scrutiny.²¹⁹ The Supreme Court has declared unconstitutional some jurisdictional provisions²²⁰ (which the Court of Military

²¹⁵ See 3 K Davis, *Administrative Law Treatise*, § 20.04 (1958) and *Public Utilities Commission v. United States*, 355 U.S. 534 (1958).

²¹⁶ See opinion of Judge Latimer in *United States v. Jacoby*, 11 U.S.C.M.A. 428, 434, 441, 29 C.M.R. 244, 250, 257 (1960) and opinion of Judge Brozman in *United States v. Sutton*, 3 U.S.C.M.A. 220, 227-28, 11 C.M.R. 220, 227-28 (1953).

²¹⁷ *United States v. Tempia*, 16 U.S.C.M.A. 629, 640-43, 37 C.M.R. 249, 260-63 (1967); *United States v. Culp*, 14 U.S.C.M.A. 199, 201, 33 C.M.R. 411, 413 (1963).

²¹⁸ *United States v. Prater*, 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971) (see note 59, *supra*).

²¹⁹ Only a few federal courts have examined the constitutionality of the UCMJ and except for *In re Stapley*, 246 F. Supp. 316 (D. Utah 1965) which held that Art. 27c did not fully protect the sixth amendment right to counsel at special courts-martial and jurisdictional issues in note 220 *infra* the Code has remained unscathed. On the efficacy of federal court review of courts-martial see note 233 *infra*.

²²⁰ Article 3(a) was held unconstitutional to the extent it purported to exercise jurisdiction over persons discharged from the service. *Toth v. Quarles*, 350 U.S. 11 (1955). This decision is part of the protection from prosecution enjoyed by some participants in the My Lai tragedy. Congress, despite the urgings of the military and others, has not provided a forum in which such persons may be tried. The President could create a military tribunal to try such persons under International Rules of War. The jurisdiction of general courts-martial under art. 18 to try persons in violation of the laws of war is not settled. See Corddry, *Jurisdiction To Try Discharged Servicemen For Violations of the Laws of War*, 26 JAG J. 63 (1971); Paust, *Legal Aspects*

Appeals had found constitutional) but has otherwise declined to question the balances struck by Congress and the tribunals created in the UCMJ. While Congress may have enacted a well balanced military justice system its constitutional perfection may be doubted. The vagueness and breadth of several punitive articles would possibly not withstand constitutional attack.²²¹ The constitutional guarantees of immunity from double jeopardy²²²

of the My Lai Incident: A Response to Professor Rubin, 50 ORE. L. REV. (1971). Article 2(11) has been held unconstitutional in *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (civilian employee for noncapital offense); *Grisham v. Hagan*, 361 U.S. 278 (1960) (civilian employee for capital offenses); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (noncapital offense committed by dependent); *Reid v. Covert*, 354 U.S. 1 (1957) (capital offense committed by dependent) *overruling Reid v. Covert*, 351 U.S. 487 (1956).

Prior to the Toth and Reid decisions the Court of Military Appeals had sustained court-martial jurisdiction over civilians in *United States v. Robertson*, 5 U.S.C.M.A. 806, 19 C.M.R. 102 (1955); *United States v. Garcia*, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954); *United States v. Weiman*, 3 U.S.C.M.A. 216, 11 C.M.R. 216 (1953). The Court qualified Toth by holding it inapplicable to a serviceman who was discharged but had reenlisted in *United States v. Gallagher*, 7 U.S.C.M.A. 506, 22 C.M.R. 216 (1957) and construing it narrowly to sustain court-martial jurisdiction over civilians overseas in *United States v. Dial*, 9 U.S.C.M.A. 541, 26 C.M.R. 321 (1958); *United States v. Wilson*, 9 U.S.C.M.A. 60, 25 C.M.R. 322 (1956); *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956). See generally *Duke and Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960); *Everett, Military Jurisdiction Over Civilians*, 1960 DUKE L. J. 366; *F. B. Wiener, Civilians Under Military Justice*. (1967).

²²¹ Art. 88 (using contemptuous words against certain public officials) see *Kester, Soldiers Who Insult the President: An Uneasy Look at Article 88 of the UCMJ*, 81 HARV. L. REV. 1967 (1968); art. 134 (conduct prejudicial to good order and discipline and service discrediting conduct) and art. 133 (conduct unbecoming an officer and a gentleman); *Cohen, The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 U.C.L.A. L. REV. 821 (1971); see *Gaynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Articles*, 22 HASTINGS L. J. 259 (1971); *Hagan, The General Article—Elemental Confusion*, 10 MIL. L. REV. 63 (1960); *Nelson, Conduct Expected of an Officer and a Gentleman*, 12 A.F. JAG. L. REV. 124 (1970); *Nichols, The Devil's Article*, 22 MIL. L. REV. 111 (1963). Some Supreme Court Justices have implied reservations about the vagueness of the general articles. See *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969) (opinion of Court by Justice Douglas); *Reid v. Covert*, 354 U.S. 1, 38 (1957) (opinion of Court by Justice Black). Article 92 (violations of general regulations) may present an even more troublesome question of constitutional vagueness and breadth. This article has not been given the attention of the general articles although it may not be a misstatement that nearly everyone in the armed forces could probably be found in violation of at least one general regulation.

²²² 21 U.S.C.M.A. 54, 44 C.M.R. 108 (1971) (construction of art. 44b in opinion by Chief Judge Darden).

and self-incrimination²²³ may require modification or clarification of the UCMJ to be perfected.

A fair appraisal of the constitutional performance of the Court of Military Appeals cannot but conclude that it has done *more than any other tribunal ever has* in securing constitutional due process in courts-martial. The "Military Supreme Court" has advanced the individual rights of military accused far greater in appreciably less time than two centuries of legislative and executive rule-making. In striking the balance between individual rights and military necessity the Court is probably close to, and in some cases beyond, what may or should be constitutionally required. The *Jacoby-Tempia* philosophy developed by the Court radically altered the common perception of the constitutional rights of servicemen and from its basic premise continued growth may be possible. Nevertheless, a reformulation and rewording of constitutional philosophy is needed and the United States Court of Military Appeals needs statutory revitalization for the strengthening of military justice.

III. A REVITALIZED COURT OF MILITARY APPEALS

A. THE NEED FOR CHANGE

1. *A Freer Balancing of Military Necessity and Individual Rights.*

Traditional military justice theory leaves wholly unencumbered Congress' power "to make Rules for the Government and Regulation of the land and naval forces."²²⁴ The President, pursuant to congressional delegation and by virtue of his office as Commander in Chief of the armed forces,²²⁵ is also accorded a significant role. The Fifth Amendment exception of grand juries for cases arising in the land and naval forces is cited as constitutional recognition of a separate judicial system. In this orthodox view the federal judiciary has little, if any, function. The Supreme Court early accepted this scheme stating in *Dynes v. Hoover*:

These provisions show that Congress has the power to provide for the trial and punishment of the military and naval offense in the manner then and now practiced by civilized nations, and that the

²²³ COMA's reliance on legislative acquiescence regarding the grants of immunity is questionable. See notes 76-79 and text *supra*.

²²⁴ U.S. Const. Art. I, sec. 8, cl. 14.

²²⁵ *Id.*, Art. 2, sec. 2.

power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.²²⁶

Although the Supreme Court proclaimed in 1953 that federal courts could review the decisions of military tribunals to insure that a "full and fair" consideration had been given to constitutional claims,²²⁷ the concept of a completely independent judicial system still persists as evidenced by the recent reference in *Parisi v. Davidson* to "the basic principles of comity that must prevail between civilian courts and the military judicial system."²²⁸

Notwithstanding a few recent decisions which have exhibited a lowering in tone,²²⁹ the Supreme Court has manifested an extreme distrust of the military justice system as a preserver of individual rights. The nation's highest court has seemingly developed an "all or nothing" approach in handling courts-martial cases. On the one hand courts-martial jurisdiction has been restricted in opinions overflowing with criticisms of military justice. Declaring unconstitutional courts-martial jurisdiction over discharged servicemen Justice Black stated:

We find nothing in the history of constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property.²³⁰

Breaking new ground in also restricting the subject matter jurisdiction of courts-martial Justice Douglas noted:

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.²³¹

²²⁶ 61 U.S. (20 How.) 65, 79 (1857).

²²⁷ *Burns v. Wilson*, 346 U.S. 137 (1953).

²²⁸ U.S. (1972) (emphasis added).

²²⁹ *Id.*, (opinion of Justice Stewart); *Relford v. Commandant*, 397 U.S. 934 (1971) (opinion of Justice Blackmun sustaining court-martial jurisdiction over serviceman; see note 231 *infra*).

²³⁰ *Toth v. Quarles*, 350 U.S. 11, 17-18 (1953).

²³¹ *O'Callahan v. Parker*, 395 U.S. 258, (1969). This novel decision has spawned much comment both critical and hopeful. See Blumenfeld, *Court-Martial Jurisdiction Over Civilian Type Crimes*, 10 AM. CRIM. L. REV. 51 (1971); Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice?* 1969 DUKE L. J. 853; McCoy, *Equal Justice Before and Since O'Callahan v. Parker*, 16 N.Y.L.F. 1 (1970); Morrison, *Court-Martial Jurisdiction: The Effect of O'Callahan v. Parker*, 11 WM. & MARY L. REV. 508 (1969); Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen*

On the other hand the Supreme Court, under the "full and fair" consideration standard, has not found an occasion to grant relief to a serviceman for the deprivation of a constitutional right.²²² This "all or nothing" approach has produced a great deal of time consuming but generally futile litigation as those convicted by courts-martial seek relief through a door leading to an empty room.²²³ It may be generally correct, as one excellent article re-

for *Civilian Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion and the Serviceman*, 51 MIL. L. REV. 41 (1971). Its impact has not been as far reaching as expected with COMA greatly limiting its application. Court-martial jurisdiction has been upheld over any offense committed on post, (*United States v. Fields*, 19 U.S.C.M.A. 419, 41 C.M.R. 419 (1970); against a military victim (*United States v. Lovejoy*, 20 U.S.C.M.A. 14, 42 C.M.R. 210 (1970); through the use of one's military status (*United States v. Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969)); or overseas (*United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969)). Also petty offenses in which there is no right to indictment by grand jury may be tried by court-martial. (*United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969)). The Court limited the retroactivity of *O'Callahan* in *United States v. Mercer*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970). The Supreme Court in *Relford v. Commandant*, 397 U.S. 934 (1971) cited a long list of COMA cases in sustaining court-martial jurisdiction over servicemen convicted of attempted rape of two civilian women on post and indicated the *O'Callahan* issue would be handled on an *ad hoc* basis. See Note, 52 MIL. L. REV. 169 (1971).

²²² In *Burns* the utilization of a coerced confession did not yield relief. In *United States v. Augenblick*, 393 U.S. 348 (1969), a Court of Claims award of back pay was reversed since an infraction of the Jencks Act was not a deprivation of a constitutional right.

²²³ Habeas corpus proceedings provide the bulk of federal court review of courts-martial. The scope of review is narrower than the review of state court determinations. Compare *Burns v. Wilson*, 346 U.S. 137 (1953) with *Brown v. Allen*, 344 U.S. 443 (1953). Other types of relief sought from civilian courts are declaratory judgements, *Gallagher v. Quinn*, 363 F. 2d 301 (D.C. Cir.), cert. denied, 385 U.S. 881 (1966) (D.C. Court of Appeals assumed it could rule on the constitutionality of the UCMJ but denied relief in this case); mandamus to obtain administrative relive from courts-martial from the secretary of a department, *Ashe v. McNamara*, 355 F. 2d 277 (1st Cir. 1965); suits for back pay in the Court of Claims, see e.g., *Augenblick v. United States*, 377 F. 2d 586 (Ct. Cl. 1967), rev'd on other grounds, 393 U.S. 348 (1969); *Shaw v. United States*, 357 F. 2d 949 (Ct. Cl. 1966). There has been greater activity with more success for petitioners (particularly with regard to in-service conscientious objector claims) in the civilian court review of administration determinations made by the armed services. On civilian court review of court-martial and administrative determinations of military, see Bishop, *Civilian Judges and Military Justice: Collateral Review of Courts-Martial*, 61 COLUM. L. REV. 40 (1961); Matz and Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L. J. 193 (1966); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971); *Civilian Court Review of Court-Martial Adjudications*, 69 COLUM. L.

cently concluded, that "the civilian type who reluctantly dons a military uniform for a few years need not fear that he simultaneously sheds his basic rights as a citizen and human being,"²³⁴ but the observation made by Justice Black sixteen years ago in *Reid v. Covert* remains disappointingly true:

As yet it has not been clearly settled to what extent the Bill of Rights and other parts of the Constitution apply to military trials.²³⁵

The most that can be confidently stated is that some constitutional rights probably protect servicemen before courts-martial and that Congress probably does not have completely unbridled discretion in establishing a system of military justice.²³⁶ Federal courts have been unable and unwilling to make a frontal attack on constitutional issues in military justice and the Court of Military Appeals has been hampered in its constitutional decision-making by an actual or felt inability to question the UCMJ and by an incomplete and still unsettled constitutional philosophy. Such reluctance and inability is understandable given the origin and history of military jurisprudence but does not justify continued uncertainty.

The time to repudiate and discard these remaining vestiges of traditional military justice theory has long since passed. Too long has the anomaly of persons defending the Constitution being deprived of its full panoply of benefits existed. It is not enough to be able to state that for all practical purposes a military accused enjoys the protection of the Bill of Rights or has rights equal to or better than a civilian defendant. The innovations in the nature of warfare, the assumption of world leadership in the 20th century, the development of the military-industrial complex, and the changes in the character of the armed forces²³⁷ combined with the growth of concern for individual rights and

REV. 1259 (1969); *Development in Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1208-38 (1970); *Servicemen in Civilian Courts*, 76 YALE L. J. 380 (1966).

²³⁴ Weckstein, *supra* note 233 at 81.

²³⁵ 354 U.S. 1, 37 (1957).

²³⁶ One could reasonably expect the present Supreme Court to strike down a legislative or executive provision denying a military accused the right to legal counsel before courts-martial or authorizing a second trial for the same offense after an acquittal on the merits.

²³⁷ M. JANOWITZ *THE NEW MILITARY* (1967); M. JANOWITZ, *THE PROFESSIONAL SOLDIER* (1960); M. JANOWITZ AND R. LITTLE, *SOCIOLOGY AND THE MILITARY ESTABLISHMENT* (rev. ed. 1965); C. MOSKOS, *THE AMERICAN ENLISTED MAN; THE RANK AND FILE IN TODAY'S MILITARY* (1970); S. STOFFER, *ET AL.*, *THE AMERICAN SOLDIER* (1949); A. YARMOLINSKY, *THE MILITARY ESTABLISHMENT: ITS IMPACT UPON AMERICAN SOCIETY* (1971).

the expansion of court-martial jurisdiction²³⁸ demands that the traditionally assumed relationship between the Constitution and the military be rethought. The influence of the military permeates modern society. Today, almost 28 million Americans have served in the armed forces²³⁹ compared to the 184,000-250,000 men that participated in the Revolutionary War.²⁴⁰ Our authorized military strength in 1971 was over 3,400,000²⁴¹ compared to the authorized volunteer Army of 840 in the first year under our Constitution.²⁴² Expenditures for National Defense were estimated at over 76 billion dollars in the 1972 fiscal year, over 40 per cent of federal expenditures.²⁴³ Congress is empowered to provide for the governing of the armed forces but the concept that somehow this enumerated power is broader than other similar powers should be rejected. Clause 6, section 8, Article I, of the Constitution gives Congress the power to provide for the punishment of counterfeiting and clause 17 empowers Congress to exercise legislative authority over the seat of government and federal property. But these provisions have never been interpreted as allowing Congress to exercise these powers in contravention of individual constitutional rights. Why then has clause 8 been frequently interpreted to the contrary? Notwithstanding general acceptance today that

²³⁸ The scope of offenses triable by courts-martial has gradually increased since the first Articles of War. The 1806 Articles contained no express provision for the trial of common law felonies. Article 33 of the 1806 Articles of War and Article 59 of the 1874 Articles of War made an offense of the failure of an officer to turn over an offender within his command to the appropriate civil magistrate upon request. In 1863 an amendment to the Articles of War specifically gave courts-martial jurisdiction to try common law felonies during a time of war. Act of March 3, 1863, ch. 75, sec. 30, 12 Stat. 731, 736. Article 58 of the 1874 Articles of War continued this provision. The 1916 revision of the Articles of War made all common law felonies punishable by court-martial except murder and rape committed in the United States during a time of peace. Articles of War, 1916, arts. 92, 93. The UCMJ completed the extension of subject matter jurisdiction making all felonies triable by courts-martial in time of war and peace. In *O'Callahan v. Parker*, 395 U.S. 258 (1969), court-martial jurisdiction was restricted to "service connected" offenses but see note 231 *supra*.

²³⁹ 1970 Administrator of Veterans' Affairs Ann. Rep. 4 (there were 27,647,000 living veterans at the end of fiscal year 1970; veterans and their families comprised approximately 48% of the U.S. population).

²⁴⁰ Statistical Abstract of the United States, U.S. Dep't of Commerce, table No. 385, at 256 (1970).

²⁴¹ *Id.*, table 372, at 255. (This number has obviously declined as U.S. manpower in Southeast Asia has diminished.)

²⁴² American State Papers Military Affairs 6 (Lowrie & Clarke ed. 1832).

²⁴³ Special Analysis, Budget of the U.S. Gov. Fiscal Year 1972, Table A-8, at 21 (1971). This table also estimates expenditures for veterans affairs at over 10 billion dollars. The impact of Defense Spending on the economy and employment of the U.S. is described in the 1971 Ann. Econ. Rep. of the President, at 42-49.

at least some constitutional rights protect those in the armed services, a more coherent theoretical constitutional underpinning is needed to guard against a future legislative or executive whim challenging the premise that servicemen enjoy the guarantees of the Bill of Rights.

A constitutional philosophy relating to military justice should begin with the recognition that the principal, and difficult, question for military jurisprudence is determining the appropriate balances between military necessity and individual constitutional rights. Frederick B. Wiener, an eminent military law scholar, has made a persuasive showing that contemporary court-martial practice before and after the adoption of the Constitution were not intended to be affected by the Bill of Rights.²⁴⁴ However, quoting from Maitland that "every age should be the mistress of its own law,"²⁴⁵ Wiener, himself, proposed that the constitutional rights of servicemen be assured by federal courts proclaiming the due process clause of the Fifth Amendment applicable to courts-martial and thereafter reading in that clause "the substance of the guarantees that have been read into the due process clause of the fourteenth."²⁴⁶ If Wiener, after mounting historical evidence against the applicability of the Constitution to courts-martial, was willing to make one constitutional provision applicable, then our generation need not, nor should not, be so reluctant in making our constitutional law. Relying solely on the due process clause to secure constitutional rights for servicemen instead of directly employing the full weight of constitutional provisions is inadequate and somewhat illogical inasmuch as the Bill of Rights was designed to restrict the federal government of which the military is a significant part. We may reasonably accept Henderson's well researched tracing of the creation of the Bill of Rights and his linguistic analysis which concludes, "On the whole, therefore, the evidence of the original intent favors the view that the bill of rights was intended to apply to those in the land and naval forces."²⁴⁷ The question then becomes who should make the balances between military necessity and individual rights?

The Constitution itself defers to military necessity by exempt-

²⁴⁴ Wiener, *Courts-Martial Practice and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958) and *Courts-Martial Practice and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958).

²⁴⁵ 3 Maitland, *Collected Papers* 487 (1911).

²⁴⁶ Wiener, II, *supra* note 244 at 303.

²⁴⁷ Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 324 (1957).

57 MILITARY LAW REVIEW

ing cases arising in the land or naval forces from the grand jury requirement.²⁴⁸ By historical implication the right to trial by petit jury may likewise be excluded.²⁴⁹ Unquestionably, Congress is the first balancer of military necessity and individual rights and can shape the means whereby the executive and the judiciary participate in this important function. These legislative powers do not, however, deny the inherent powers of the other branches of government and do not deny the existence of individual constitutional rights.²⁵⁰ That Congress has never entrusted review of courts-martial to the federal judiciary and that the federal courts have not sought to bridge the traditional gap between military and civilian justice need not bind the future. Although the military establishment has, since the founding of our country, enjoyed the shield of supposed legislative and executive balancing or has rested on mere assertions of military necessity in avoiding judicial scrutiny the continued assumption that the legislature and the executive can best make the appropriate balances between military necessity and individual rights is naive, at best, and dangerous at worst. Under orthodox theory and practice the military establishment was essentially unfettered in the administration of its court-martial system as Congress only occasionally enacted legislation, the President generally agreed with his military advisors, and federal courts rarely interfered with military tribunals. The creation of the Court of Military Appeals partially lifted the shelter from judicial review and the very performance of that Court demonstrates that a judicial tribunal is well suited to perform the delicate balancing between individual rights and military necessity. It is probably better able to perform this function than intermittent legislative or executive rule-making. As in every area of law the three branches of government should have a role in military justice. Thus, the proposals below are intended to utilize more fully the judicial capacity for consistent, informed, and flexible decision-making by freeing the Court of Military Appeals from its reluctance to challenge overtly the judgment of Congress and by freeing the Supreme Court from the historically limited scope of court-martial review and its fear of interference with the

²⁴⁸ U.S. Const. amend V.

²⁴⁹ Henderson, *supra* note 247 at 303-15.

²⁵⁰ Constitutional rights may exist without their being fully protected by an Article III tribunal. Indeed, *Burns v. Wilson*, 346 U.S. 137 (1953), recognized this in charging military tribunals with protecting the constitutional rights of military accused. Many at the bar, on the bench, and in legal writing have confused the lack of direct review by federal judiciary with a lack of constitutional rights.

military. Then, having provided for an unrestrained judicial role, the difficult question in military jurisprudence of what is the appropriate balance between military necessity and individual rights may be tackled in earnest. Other than to distinguish the grand jury and petit jury rights from other constitutional guarantees the applicability concepts and language of present military constitutional theory should be replaced with more interest analysis and balancing tests. Constitutional rights are not absolute but subject in varying degrees to qualifications of time, place, and circumstance. The requirements of the military situation may be fully respected without military necessity determining the *applicability* of a constitutional guarantee.²⁵¹

2. *Judicial Economy and Prestige.*

Although having declared itself a "court established by Act of Congress,"²⁵² capable of belonging to the federal judiciary²⁵³ the Court of Military Appeals is not generally considered a part of the federal judiciary and is sometimes referred to as nothing more than an administrative tribunal.²⁵⁴ The Court has been relatively ignored by federal courts notwithstanding its performance as being perhaps the organization most responsible for the absence of courts-martial in which federal courts can find a lack of

²⁵¹ Applicability is a harsh concept and its sweeping rhetoric may breed charges of puffing and deception upon examination of particular decisions. As previously noted merely declaring something applicable does not yield a given result. It could be argued that this is only proposing a mere distinction without a difference. However, replacing applicability concepts with balancing tests and interest analysis would force COMA and its critics to focus more sharply on the actual interests involved in a particular case. Interest analysis would probably not change very many decisions but it would avoid the confusion and apparent inconsistency present in applicability concepts.

²⁵² *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966) (declaring possession of extraordinary writ power under the All Writs Act, 28 U.S.C. sec. 1651(a), see note 264 *infra*; the Supreme Court concurred in this interpretation in *Noyd v. Bond*, 395 U.S. 683 (1969)).

²⁵³ *United States v. Borys*, 18 U.S.C.M.A. 547, 560, 40 C.M.R. 259, 272 (1969) (dissenting opinion of Quinn, J. which outlines the role, status, performance of COMA as seen by its judge with the longest service). See also Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L. REV. 1240 (1968).

²⁵⁴ The Court of Military Appeals is not a "court of the United States" within the meaning of title 28, U.S. Code. See 28 U.S.C. sec. 451. It is not a participant in the Judicial Conference of the United States, 28 U.S.C. sec. 331, and its function and workload is not contained in the Annual Reports of the Director of the Administrative Office of the U.S. Courts. A pamphlet entitled "The United States Courts" prepared for use by the House Judiciary Committee contains not a single word about the Court of Military Appeals although all other federal courts, Article I and Article III, are mentioned. COMA is described as closer to an administrative agency than a court in C. Wright, *Law of Federal Courts*, 12, 34 (1970).

57 MILITARY LAW REVIEW

"full and fair" consideration of constitutional claims.²³⁵ Viewing itself as the "Supreme Court" of the military and the insurer of fairness in courts-martial proceedings the Court of Military Appeals has been disturbed by the treatment and consideration it has received from the federal courts. Former Chief Judge Quinn once complained to Senator Ervin's Subcommittee on Constitutional Rights:

I certainly think the other Federal courts rather look down their noses at the Court of Military Appeals, and are inclined to think that it is not a court in every sense of the word. The Court of Military Appeals deals with the lives and the fortunes of the flower of our American manhood—in other words, the Army, the Navy, the Air Force, the Marine Corps who guard our lives and liberties. Our work at the court is concerned solely with the lives and fortunes of those men. While we do not deal in billions of dollars we do deal in things that are more precious, in my opinion, I think our courts should have equal standing with other Federal courts of the United States.²³⁶

In addition to its inferior status, the probable explanation for this unfortunate situation is the lack of understanding by the civilian bar and bench about military justice in general and the appellate process in the military justice system in particular. Those unfamiliar with modern military justice tend to look telescopically at military justice attributing the characteristics of courts-martial to all military tribunals whereas appellate courts in the military justice system are wholly different from the trial courts in organization, composition, and function. Assimilation of the Court of Military Appeals into the federal judiciary would not only relieve the Court of its inferiority complex and boost its standing with other federal courts, but would also eliminate

²³⁵ Although one might disagree with a decision of the Court of Military Appeals it would be difficult to maintain that "fair and full" consideration had not been given to a case it had acted upon. Special courts-martial not reviewable by the Court of Military Appeals may give rise to some cases to which the Burns test would yield. However, now a person convicted by a special court-martial may have his case reviewed by the Judge Advocate General of his service under Article 69 if the case is not within the jurisdiction of COMA and thus another exhaustion requirement may exist for petitioners seeking relief from federal courts. With the declaration of its possession of extraordinary writ power the Court of Military Appeals added another exhaustion requirement *see* *United States v. Augenblick*, 393 U.S. 348, 350 (1969).

²³⁶ *Joint Hearings on S. 745-62 and 2906-07 Before the Senate Subcommittee on Constitutional Rights of the Comm. on the Judiciary and a Special Subcommittee on Armed Services*, 89th Cong., 2d Sess., 282 (1966).

much of the confusion that abounds in collateral attacks of courts-martial convictions.²⁵⁷

3. Jurisdictional Limitations.

The Court of Military Appeals can only review cases involving a general or flag officer or a sentence of death, cases certified by a Judge Advocate General, and cases involving a sentence of dismissal or discharge or confinement for one year or more.²⁵⁸ The Court has therefore only participated in a very small percentage of courts-martial and has no direct supervisory control over a large number of courts-martial.²⁵⁹ The case of *United States v.*

²⁵⁷ See note 233 *supra*. Most comments on this issue call for greater federal court scrutiny of court-martial proceedings. The disparity between the treatment of military and state convictions has been labeled "ludicrous" (Comment, *Federal Court Review of Decisions of Military Tribunals*, 40 U. OF CINN. L. REV. 569 (1971)) and "difficult to justify" (Comment, *Civilian Review of Military Courts-Martial*, 1971 U. ILL. L. FORUM 124, 129). One learned author offers a partial explanation in the observation that federal courts, aside from adhering to the customary "hands off" attitude, often confuse their decision making by mixing nonreviewability and exhaustion language (Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement* 55 VA. L. REV. 483, 521 (1969)). A fair summary of current law on collateral attacks of courts-martial is, as it was 11 years ago, that "the most that can be said—and it may prove a great deal—is that since and despite *Burns v. Wilson* the inferior federal courts have tended to reject the more extreme claims of the Government and to include in the opinions dicta that at least preserve their freedom of maneuver." (Bishop, *Civilian Judges and Military Justice: Collateral Review of Courts-Martial*, 61 COLUM. L. REV. 40, 70 (1961)). Despite freedom of maneuver in federal courts, collateral attacks on courts-martial are generally futile. Few federal courts have deviated from the "broaden the standard but deny the relief" syndrome, *Burris and Jones, Civilian Courts and Courts-Martial—The Civilian Attorney's Perspectives*, 10 AMER. CRIM. L. REV. 139, 147 (1971). Skeptical of inservice judicial channels serving as the arbiters of soldiers' constitutional rights these authors call on their fellow members of the civilian bar to convince civilian courts to assure constitutional due process. Given the present structure of military justice this approach is indeed appropriate. However, radical restructuring of military justice may make this time consuming and doubtful alternative unnecessary. If COMA were made an Article III tribunal and there was a possibility of review by the Supreme Court the basis and necessity for these collateral attacks would be eliminated.

²⁵⁸ UCMJ, art. 67(b). See Willis, at n. 179-83.

²⁵⁹ Since the UCMJ became effective on May 31, 1951, there have been nearly 8 million courts-martial; the Court has acted in 24,347 cases rendering 3,180 opinions. Figures compiled from 1951-71 Annual Reports, U.S. Court of Military Appeals & The Judge Advocate General [hereinafter cited as Annual Report]. Thus, the Court has acted in only .8% of the courts-martial convened since its establishment. This figure is misleading in view of the overwhelming number of summary and special courts-martial as compared to the general courts-martial which may impose severe punishments. Data from the 1962-1969 Annual Reports indicates that the Court of Military Appeals has acted in approximately 17.3% of the cases referred to a Court of Military Review (Boards of Review). The Courts of Military Review have acted in approxi-

57 MILITARY LAW REVIEW

*Bondy*²⁰⁰ exhibits some of the consequences of these jurisdictional limitations. Privates Bondy and Kempenar were jointly tried and convicted of the wrongful appropriation of a motor vehicle and unauthorized absences. Private Kempenar, who had some previous convictions, received a bad conduct discharge, six months' confinement, and forfeiture of pay for six months. Private Bondy received confinement and forfeiture of pay for three months. The convening authority approved the sentences and forwarded the record of trial to Washington for further review. A Navy board of review set aside part of the findings as based on insufficient evidence and reduced Kempenar's sentence to two months' confinement with forfeiture and Bondy's sentence to one month confinement with forfeiture.²⁰¹ The Navy Judge Advocate General certified to the Court of Military Appeals the action taken by the board of review in reducing Bondy's sentence. The Court agreed with the Navy Judge Advocate General that the board of review had no power to reduce Private Bondy's sentence since the sentence he had received at the joint trial did not qualify his "case" for review by the board of review. Thus, the defendant who received the lesser sentence from the trial court was deprived of the benefit of appellate review which led to a reversal of findings and a reduction in sentence for his co-defendant.²⁰² By holding that the board of review lacked jurisdiction over the case the Court was acknowledging its own lack of jurisdiction except when a case is certified by a Judge Advocate General. The *Bondy* case raises doubt about jurisdictional limitations based on sentences and automatic review on certification by a Judge Advocate General.²⁰³

mately 6% of courts-martial. The data presented here is somewhat incomplete but does accurately portray the limited scope of appellate review. For a summary comparison of civilian and appellate workloads see Karlen, *Civilian and Military Justice at the Appellate Review*, 1968 WIS. L. REV. 786.

²⁰⁰ 13 U.S.C.M.A. 448, 32 C.M.R. 448 (1963).

²⁰¹ *United States v. Bondy and Kempenar*, WC NCM 62-00520 (1963) (not reported).

²⁰² During oral argument before the Court of Military Appeals government counsel revealed that the Navy Judge Advocate General would insure Bondy would not be disadvantaged by the Board of Review decision.

²⁰³ UCMJ, art. 67(b) (2) provides that a Judge Advocate General may certify a case to COMA. Through fiscal year 1971 there had been 523 cases certified to the Court with the Navy Judge Advocate General certifying the most although the Army has significantly more courts-martial. A Judge Advocate General may use his certification power and referral power under Article 69 to obtain review by COMA of a general court-martial not otherwise within the sentence jurisdiction of COMA. *United States v. Monett*, 16 U.S.C.M.A. 179, 36 C.M.R. 335 (1966) (procedure sustained as a valid exercise of congressional discretion; central purpose seen as providing for

The jurisdictional weaknesses of the Court of Military Appeals are plainly evident in its exercise of extraordinary writ power.²⁰⁴ This has extended the Court's jurisdiction to cases which may not have come before it depending upon the sentence adjudged by a court-martial and approved by a convening authority. However, because of judicial conservatism, limited original jurisdiction, and uncertainty about the remedies it may grant and enforce the Court has infrequently granted relief.²⁰⁵ The only

uniformity among the services). In certifying a case the Judge Advocate General is not limited to an adverse decision from a Court of Military Review, *United States v. Zimmerman*, 2 U.S.C.M.A. 12, 6 C.M.R. 12 (1952), and may certify a case tried under the laws of war as well as under the UCMJ, *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952). The Court may enlarge the issues upon request of an accused, *United States v. Simone*, 6 U.S.C.M.A. 146, 19 C.M.R. 272 (1955); *United States v. Zimmerman*, 1 U.S.C.M.A. 66, 1 C.M.R. 66 (1952). The Court has indicated its dislike of advisory opinions, e.g., *United States v. Fisher*, 7 U.S.C.M.A. 270, 22 C.M.R. 60 (1956) (refused to answer question on law officer instruction where immaterial to verdict), and has dismissed some questions as moot, e.g., *United States v. Bedgood*, 12 U.S.C.M.A. 16, 30 C.M.R. 16 (1960). Also, the Court cannot answer a question of fact upon certification. *United States v. Remele*, 13 U.S.C.M.A. 617, 33 C.M.R. 149 (1963). The actions of the Court in refusing to answer certified questions, disposing of cases on issues not raised, and placing a time limitation on certification was criticized as denying the Judge Advocates General's historical and statutory authority to promote clarity of law and harmonize conflicting Board of Review decisions in Mummey, *Judicial Limitations Upon a Statutory Right: The Power of The Judge Advocate General to Certify Under Article 67(b) (2)*, 12 MIL. L. REV. 193 (1961).

²⁰⁴ The Court declared itself "a court established by Act of Congress" within the All Writs Act, 28 U.S.C. sec. 1651(a) in *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). Judge Brosman, as early as 1954, stated that the Court possessed extraordinary powers under the All Writs Act in *United States v. Ferguson*, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954). On two other occasions the Court without deciding if it possessed power to act on a writ of *coram nobis* dismissed the writs after finding no basis for relief. See *United States v. Tavares*, 10 U.S.C.M.A. 282, 27 C.M.R. 356 (1959); *United States v. Buck*, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958). For comment on Court's assumption of extraordinary writ power see Everett, *Collateral Attack on Courts-Martial Convictions*, 11 A.F. JAG L. REV. 399 (1969); Grafman, *Extraordinary Relief and the United States Court of Military Appeals*, 24 JAG J. 61 (1969); Rankin, *The All Writs Act and the Military Justice System*, 53 MIL. L. REV. 103 (1971).

²⁰⁵ Annual Report, 1971, *supra* note 259, indicates that through June 30, 1971, relief had been granted in only 3 out of 216 petitions assigned docket numbers. Research has produced the following instances in which relief was granted: *Seelke v. United States*, 21 U.S.C.M.A. 299, 45 C.M.R. 73 (1972) (en banc decision of ACMR set aside as improper under Chilcote, 20 U.S.C.M.A. 283, 43 C.M.R. 123 (1971)); *Coleman v. United States*, 21 U.S.C.M.A. 171, 44 C.M.R. 225 (1972) (en banc decision of AFCMR set aside); *Lohr v. United States*, 21 U.S.C.M.A. 150, 44 C.M.R. 204 (1972) (en banc decision of AFCMR set aside); *Belichsky v. Bowman*, 21 U.S.C.M.A. 146, 44 C.M.R. 200 (1972) (vacation proceeding prohibited since court-martial conviction lacked jurisdiction under *United States v.*

apparent enforcement power under UCMJ, Article 67, is to set aside findings and dismiss charges in those cases where its mandate was ignored if that case was normally reviewable by the Court.²⁶⁶

Limited to granting writs in the aid of its jurisdiction the Court has had to deny petitions seeking relief from nonjudicial punishment,²⁶⁷ summary courts-martial,²⁶⁸ special courts-martial at which no bad conduct discharge can be or was adjudged,²⁶⁹ special courts-martial reviewed by a Judge Advocate General under Article 69,²⁷⁰ courts-martial final before the effective date of the UCMJ,²⁷¹ and administrative determinations.²⁷² Few substantive issues have been decided by rulings on the various petitions²⁷³ as the Court has developed an exhaustion of remedies doctrine requiring petitioners to seek appropriate relief from the Article 32 officer, the convening authority, the military judge and through the use of Article 138.²⁷⁴ If remedies are not available or have

Dean, 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970)); *Petty v. Moriarty*, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971) (Art. 32 enjoined because of improper withdrawal of charges from a special court); *Collier v. United States*, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970) (recision of deferment of confinement held abuse of discretion where only change was a change of commanders); *Zamora v. Woodson*, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970) (general court-martial enjoined because of lack of jurisdiction over civilian in Vietnam; Art. 2(10) construed); *Fleiner v. Koch*, 19 U.S.C.M.A. 630 (1969) (O'Callahan lack of jurisdiction successfully invoked); *Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968) (held unlawful for convening authority to commute bad conduct discharge adjudged at special court-martial to additional confinement and forfeitures beyond six months); *United States v. Boards of Review*, Nos. 2, 1, 4, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967) (request for order by government to vacate board of review decisions in order to follow United States v. Dubay guidelines for inquiring into command influences); *Johnson v. United States*, 19 U.S.C.M.A. 407, 42 C.M.R. 9 (1970) (status of petitioner for new trial; *Maze v. ACMB*, 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1971) (en banc decision reversed)).

²⁶⁶ The Court has no express contempt power nor any machinery to enforce interlocutory decrees.

²⁶⁷ *Whalen v. Stokes*, 19 U.S.C.M.A. 636 (1970).

²⁶⁸ *Thomas v. United States*, 19 U.S.C.M.A. 639 (1970).

²⁶⁹ *Hyatt v. United States*, 19 U.S.C.M.A. 635 (1970); *In re Watson*, 19 U.S.C.M.A. 401, 42 C.M.R. 3 (1970) (also refused class action).

²⁷⁰ *Snyder v. United States*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).

²⁷¹ *United States v. Homcy*, 18 U.S.C.M.A. 515, 40 C.M.R. 227 (1969).

²⁷² *Hurt v. United States*, 19 U.S.C.M.A. 584, 42 C.M.R. 186 (1970) (denial of pay and allowances under DOD Pay Manual); *Mueller v. Brown*, 18 U.S.C.M.A. 534, 40 C.M.R. 246 (1969) (cannot review denial of request for separation as conscientious objector in absence of court-martial proceeding).

²⁷³ See however *McDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970) (Art. 32 may be closed to the public); *Green v. Widdecke*, 19 U.S.C.M.A. 576, 42 C.M.R. 178 (1970) (convening authority may grant immunity to a witness and still refer a case to trial).

²⁷⁴ *Catlow v. Cooksey*, 21 U.S.C.M.A. 106, 44 C.M.R. 160 (1971); *Font v. United States*, 20 U.S.C.M.A. 387, C.M.R. 227 (1971); *Herrod v. Widdecke*, 19 U.S.C.M.A. 574, 42 C.M.R. 176 (1970).

been exhausted a petitioner must then show prejudice or an abuse of discretion to secure the extraordinary relief.²⁷⁵ In summary, the experience with the extraordinary writ power strongly suggests the need for a reevaluation of the jurisdiction of the Court of Military Appeals and the necessity for statutory authorization. Former Chief Judge Quinn overstated the law in proclaiming the Court "is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court-martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary."²⁷⁶ Unfortunately though it may be, the present Chief Judge is more correct in observing "Congress simply has not empowered this Court to vindicate all constitutional or statutory rights of a member of the armed forces at all places and in all circumstances."²⁷⁷

B. PROPOSALS FOR A REVITALIZED COURT

As part of the Military Justice Act of 1968 Congress amended Article 67 to read:

There is a *United States Court of Military Appeals* established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense.²⁷⁸

²⁷⁵ *West v. Samuel*, 21 U.S.C.M.A. 290, 45 C.M.R. 64 (1972) (denial of motion for severance of charges not a clear abuse of discretion or usurpation of judicial power and ordinary channels of appellate review adequate protection); *Eaton v. Laird*, 19 U.S.C.M.A. 637 (1970); *Horner v. Resor*, 19 U.S.C.M.A. 285, 41 C.M.R. 285 (1970).

²⁷⁶ *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 11-12, 39 C.M.R. 10, 11-12 (1968). Such "grandiloquent phrases" in the exercise of this power was a major basis for condemnation of the Court in Benson. Benson, however, placed entirely too much emphasis on this aspect of the Court, failing to appreciate the Court's limited original jurisdiction. The judges rhetoric is more properly viewed as an attempt to bolster its status and encourage congressional efforts to strengthen the Court.

²⁷⁷ *Petty v. Moriarty*, 20 U.S.C.M.A. 438, 443, 43 C.M.R. 278, 284 (1971) (dissenting opinion). The inadequacy of the Court's extraordinary writ power was recently demonstrated in *Allen v. United States*, 21 U.S.C.M.A. 288, 45 C.M.R. 62 (1972) where despite conviction by a court-martial lacking jurisdiction under *United States v. Dean*, 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970) relief was denied because of the failure to petition COMA within the time limit of art. 67(c), the completion of the sentence, and the petitioner's release from active duty. Although COMA noted the Board for Correction of Naval Records could change the character of the discharge, PVT Allen will evidently have to go to federal court to have his conviction erased, a curious decision.

²⁷⁸ UCMJ, art. 67(a) (1) (emphasis added).

This was done to make clear that the Court was not an administrative agency but a legislative court.²⁷⁹ Despite this effort to buoy the Court of Military Appeals, the need remains for a more independent and freer balancing of interests, the elimination of jurisdictional deficiencies, and greater prestige. The proposals below are not totally new but it is hoped that the assertion and discussion herein may assist in their realization.

1. *Conferring Constitutional or Article III Status.*

Only tradition, not logic or the Constitution, would stand in the way of Congress' providing for the review of courts-martial by an Article III court. There is no inherent inconsistency between the congressional powers "to constitute tribunals inferior to the supreme court" and "to make Rules for the Government and Regulation of the land and naval forces."²⁸⁰ The passing of judgment on the life and liberty of those convicted by the government in a military trial surely falls within the judicial power of Article III.²⁸¹ To insure Article III status for the Court of Military Appeals, Congress should expressly state its intention to establish an inferior federal tribunal. The Court of Customs and Patent Appeals and the Court of Claims were only deemed "constitutional" as opposed to "legislative" courts in 1962 by the Supreme Court decision in *Glidden v. Zdanok*.²⁸² Although the stated basis of *Glidden* centered on judicial function and independence the fact that Congress had expressly declared the courts to be

²⁷⁹ S. REP. NO. 806, 90th Cong., 1st Sess. (1967) H.R. REP. NO. 1480 90th Cong., 2d Sess. (1968) (while this report noted that the Court of Military Appeals could question executive and departmental regulations the power to rule on the Code was not mentioned).

²⁸⁰ U.S. CONST. art. I, sec. 8, cls. 9 and 14.

²⁸¹ U.S. CONST. art. III, sec. 1, provides in part "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority." A court-martial conviction rests on Acts of Congress and therefore clearly "arises under" the judicial power. Trial by court-martial may be an exception to the judicial power because of paragraph 3, section 2, of Article III which states "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed within any State, the trial shall be at such place or places as the Congress may by Law have directed." See Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 300-01 (1957). However, this awkwardness does not prohibit appellate jurisdiction of courts-martial otherwise within the judicial power of the United States.

²⁸² *Glidden v. Zdanok*, 370 U.S. 530 (1962).

constitutional looms significant on analysis.²⁸³ In addition to the benefits that would accrue from the greater independence of the judges and the attraction of qualified persons, life tenure is an essential prerequisite to the creation of an Article III tribunal.²⁸⁴ Three times the House of Representatives has provided for life tenure for the judges of the Court of Military Appeals but the Senate has failed to pass the provision.²⁸⁵ The judges of the Court have also recommended that they be granted life tenure.²⁸⁶ Senate concerns at the time of the passage of the Uniform Code of Military Justice were a fear of lame duck appointments and uncertainty over the future workload of the Court.²⁸⁷ These fears have proved unwarranted and should no longer detain the Senate from agreeing to fully judicialize the United States Court of Military Appeals. The conferring of Article III status would eliminate any actual or felt inability by the judges to question the Code, reduce the judicial inefficiencies caused by collateral attacks on courts-martial, and pave the way for direct review by the Supreme Court.

2. Increase in the Number of Judges.

For over twenty years a three-man tribunal has been acting in over 1,100 cases a year rendering approximately 140 opinions a year.²⁸⁸ Although the judges of the Court of Military Appeals have managed to avoid a clogged docket, an increase in the number of judges would greatly aid the functioning of the Court. A larger

²⁸³ Compare opinions in *Glidden* with *Ex parte Bakelite*, 279 U.S. 438 (1929) and *Williams v. United States*, 289 U.S. 553 (1933) wherein the Court of Customs and Patent Appeals and the Court of Claims were respectively held not "constitutional courts." The history and rationale of the legislative/constitutional court distinction is described in C. WRIGHT, *LAW OF FEDERAL COURTS* 26-34 (1970).

²⁸⁴ U.S. CONST. art. III, sec. 1 provides in part, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office." The need for judicial independence may sometimes be overstated but the potential or appearance of abuse exists if judges are subject to the uncertainties of reappointment. Experience with territorial courts shows that this possibility is not as remote as one may like to think. See Metzger, *Why I Am No Longer A Judge*, 177 THE NATION 52 (1953). On the Court of Military Appeals Judge Latimer was not reappointed when his term expired in 1961 but was replaced by Congressman Kilday. Judge Quinn was reappointed in 1966. Judge Ferguson was not reappointed when his term expired in 1971 although he remains as a senior judge of the Court, see note 40 *supra*. Judges Brosman and Kilday died while in office.

²⁸⁵ H.R. REP. NO. 1480, 90th Cong., 2d Sess., 2 (1968).

²⁸⁶ Annual Report, 1965, *supra* note 259, at 13.

²⁸⁷ Willis, at 68, n. 146, 149.

²⁸⁸ See note 259 *supra*.

court (an increase to five members would be helpful, but seven or nine preferable) would promote stability in the Court by lessening the significance of a judge's death or temporary absence on decision making.²⁸⁹ An increase in the membership would also provide an opportunity to obtain a court of more diverse background and persuasion. While no adverse reflection is intended on any of the judges, analysis suggests the need for greater diversity on the Court. Two recent appointees have come directly from congressional positions involving the armed services.²⁹⁰ All of the former and present judges except Judge Ferguson have had military experience or had a previous relationship with the military establishment.²⁹¹ Four judges had previous civilian judicial experience²⁹² while only one has had a legal academic background.²⁹³ Further, an increased number of judges would be a breath of fresh air to the decisions of the Court adding a richness and depth. More judges would enable the caseload to be more widely distributed, hopefully allowing the Court to engage in the creativity that characterized its early years and to illuminate and amplify the wealth of doctrine that has been formulated by the former and present judges. The arduous task of balancing individual rights and military necessity could be pursued with greater interest analysis. In the event of another global confrontation more judges would also allow the Court (with modification of its quorum rules) to handle an increased caseload, even perhaps, in

²⁸⁹ See notes 40, 58, 284 and text *supra*. As a comparison, the U.S. Circuit Courts have 3-15 judges each; the Court of Claims has 7 judges; the Court of Customs and Patent Appeals has 5 judges; the Customs Court has 9 judges; the Tax Court has 16 judges.

²⁹⁰ Judge Darden was the Chief of the Professional Staff of the Senate Armed Services Comm. when appointed; Judge Kilday was a member of the House of Representatives and a senior member of the House Armed Services Comm.

²⁹¹ Quinn (Cpt., USNR; Legal Officer, First Naval District, 1942-45); Latimer (Col. on General Staff of the National Guard and AUS during WW II); Brosman (worked in Office of Judge Advocate General in Army Air Corps, 1942-45); Kilday (House Armed Services Comm., 1946-61); Darden (served in U.S. Navy, 1943-46 and on professional staff of Senate Comm. on Armed Services, 1953-68); Duncan (served in U.S. Army 1952-56). While these facts may point to a need for greater diversity, they do not by themselves support charges of undue alignment with the military establishment. See Benson, at 17. Such superficial charges fail to recognize the hostility toward the Court from the military during its first decade and the Court's refusal to bow to such pressure. See Willis, at 90-92.

²⁹² Quinn, Latimer, Ferguson, Duncan.

²⁹³ Brosman.

more than one locality.²⁹⁴ It might be argued that this proposal would naturally slow decision-making but the retention of the statutory 30-day requirement for ruling on petitions for review would keep backlogs at a minimum.²⁹⁵ Any additional time awaiting decision on petitions granted would probably not be much in excess of present time lags and could even be reduced with other improvements in military justice.²⁹⁶ The exercise of extraordinary powers could also be facilitated with an increased number of judges, each supervising a given area, service, or command.

²⁹⁴ One career army lawyer proposed that in the event of a global conflict the three judges of the Court could sit on alternate days in different theaters of conflict to insure the speedy disposition of cases. Lighthall, *Preparing for Appellate Review of Records of Trial in the Event of General Mobilization* (1958) (unpublished thesis presented to The Judge Advocate General's School). An increased number of judges would make such a possibility more feasible although the military justice experience during Vietnam does not suggest such a need and hopefully global conflicts have become a relic. Senator Bayh and Congressman Bennett have proposed a nine man court authorized to sit in three judge panels. S. 1127, 92d Cong., 1st Sess. sec. 867 (1971); H.R. 579, 92d Cong., 1st Sess. sec. 867 (1971). If there were authority to sit in panels en banc rehearings should be permitted. See e.g., 28 U.S.C. sec. 175 for Court of Claims provisions.

²⁹⁵ UCMJ, art. 67(c).

²⁹⁶ Information released by Chief, Records Control and Analysis Branch, US Army Judiciary, for the month of February, 1972, shows in general courts-martial a 424.8 day average processing time for guilty pleas and 548.9 days for not guilty pleas from date of trial until decision by COMA. See chart below. This time lag could be reduced significantly by other changes such as elimination of convening authority action and automatic review. IX. A. General Court-Martial time-lags (average number of days based on total accused):

	G Plea Counsel	NG Plea Counsel	No Counsel G Plea	No Counsel NG Plea
1. Arrest, restraint or date of the affidavit, to trial	75.6	75.2	59.8	44.5
2. Trial to C/A action	51.6	77.4	49.4	60.6
3. C/A action to receipt in OTJAG	24.6	26.2	16.6	11.9
4. Receipt in OTJAG to forwarded to COMR	118.9	165.9	4.6	4.9
5. Date forwarded to COMR to COMR decision	37.1	59.3	7.8	3.5
6. Court of Military Review de- cision to Petition to CMA	49.8	71.9	54.6	57.8
7. Petition dispatched to CMA to CMA ruling	35.8	39.2	34.8	44.0
8. CMA ruling to CMA opinion	108.0	109.0	—	—
TOTAL	501.4	624.1	227.6	227.6

57 MILITARY LAW REVIEW

3. Increased Jurisdiction and Powers.

The Court of Military Appeals should possess jurisdiction over any court-martial upon a petition showing good cause from a final judgment or decree of a Court of Military Review.²⁹⁷ As with previous endeavors to erect appellate safeguards this expansion of the Court's jurisdiction would probably meet resistance from the military establishment with an argument of the need for speedy justice and finality. Concurrent changes in military justice such as increased powers and reliance on military judges at the trial level,²⁹⁸ elimination of the three-tier court-martial classification,²⁹⁹ elimination of convening authorities from legal

²⁹⁷ This would require changes in art. 66, Courts of Military Review, expanding the jurisdiction and powers of that court. See note 302 *infra*. Also contemplated in this sentence is the elimination of automatic review of cases in which a death sentence has been approved and cases involving a general or flag officer. While such automatic review may be constitutionally permissible (See *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir.), *cert denied*, 385 U.S. 881 (1966)) its inclusion may be unnecessary. Since the effective date of the UCMJ there have only been 35 death cases (Annual Report, 1971, *supra* note 259) and only two cases involving a general or flag officer (*United States v. Hooper*, 11 U.S.C.M.A. 99, 28 C.M.R. 352 (1960); *United States v. Grow*, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953)). Automatic appeal right in the Courts of Military Review should however be retained.

²⁹⁸ Further development and utilization of the military judiciary would probably reduce the number of cases requiring appellate reversal. A permanent military judicial structure is a desirable goal (see congressional proposals note 320 *infra*) however, without much disruption to contemporary military justice military judges could be immediately given the power to issue subpoenas, to authorize searches (see note 147 *supra*), to supervise pretrial and post-trial restraint, see note 175 *supra*, and to play a greater role in sentencing (including suspending sentences and sentencing rather than court members), see *Hunt, Sentencing in the Military*, 10 AMER. CRIM. L. REV. 107 (1971). For comment on the performance and potential of military judges see *Douglass, The Judicialization of Military Courts*, 22 HASTINGS L. J. 213 (1971).

²⁹⁹ Increased responsibility and utilization of military judges may induce the discarding of the summary, special, general court-martial system. The summary court has particularly been the target of much justifiable criticism. (See e.g., *Ervin, The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 94-95 (1969). Only one type of court-martial with simultaneous increases in Article 15 powers was proposed in the Report to Hon. Wilbur M. Brucker, Sec. of Army, by the Comm. on the Uniform Code of Military Justice, Good Order and Discipline in the Army, 33 (Jan. 18, 1960) (commonly known as the Powell Report this high level committee made a broadside attack on the Court of Military Appeals but also made some laudatory proposals for improving military justice, see *Willis*, at n. 284). A two level court-martial system—one for serious offenses with punitive discharge power and another with punishment limitations—may be the most appropriate. Modifying the court-martial structure would permit judicial appellate review of all cases. Likely objection to potential greater workloads in preparing records of trial could be mollified with greater use of electronic recording devices and limitations on appeal rights (see note 301 *infra*). Serious consideration to reducing court-martial subject matter jurisdiction by a narrower interpretation of service-connected

review,³⁰⁰ elimination of automatic review for certain cases,³⁰¹ and greater flexibility and powers for the Courts of Military Review,³⁰² would ameliorate much of this objection. At least the

offenses and elimination of certain offenses would prevent clogged military courts. For example, a redefining of absence offenses could reduce appellate review in the Army by over 25% and trial level workloads by even more. Simple AWOL should be subject to administrative disciplinary action only while intentional absences such as desertion and missing movement remain subject to criminal sanction. Particularly in a modern volunteer army such a break with tradition could be implemented.

³⁰⁰ Under present military law the convening authority is required to take action with respect to court-martial findings as well as sentence. UCMJ, arts. 60, 64. In a general court-martial or special court-martial adjudging a bad conduct discharge a post trial review by a staff judge advocate is required. UCMJ, arts. 61, 65. This process is not only time consuming (1½ to 3 mos see ARMY LAWYER, April, 1972, at 8-10) but also a fertile ground of appellate activity in the military. See e.g., *United States v. Cruse*, 21 U.S.C.M.A. 286, 45 C.M.R. 60 (1972) (reversing because testimony of witness not summarized); *United States v. Boatner*, 20 U.S.C.M.A. 376, 43 C.M.R. 216 (1971) (failure to advise convening authority of immediate commander's recommendation of retention in service held prejudicial error). Elimination of convening authority action on findings has been suggested by those inside and outside the military establishment. Most, however, agree that the convening authority should retain some clemency powers. Another convening authority power which should be rescinded is the power to return to a court-martial a ruling not amounting to a finding of not guilty (i.e. dismissal on basis of denial of speedy trial). A governmental right to interlocutory appeal to a higher military court on certain issues would be a better arrangement.

³⁰¹ Presently a military accused (other than a general or flag officer and one sentenced to death who possess appellate rights in every case) sentenced to a punitive discharge or confinement at hard labor for one year or more has his case automatically reviewed by a Court of Military Review. Under Art. 69 all other general courts-martial are and other courts-martial may be examined in the Office of a Judge Advocate General. Removing the sentence barriers to appellate review in the military could be made practical by changing the automatic review (except in death, general, or flag cases) to only an absolute right to appeal to the Court of Military Review and by imposing time limitations (10 or 30 days) on this right. While it is beyond the scope of this footnote to gauge the impact of such a change with any precision one familiar with military justice could reasonably expect a decline or slight change in appellate workloads. Information released by the U.S. Army Judiciary shows that over 30% of those currently entitled to automatic review do not exercise their right to appellate counsel. The decisions of those electing counsel would probably also be modified if this first appellate step was not automatic. The time limitation on appeal rights with increased access to appellate courts (see note 302 *infra*) might also encourage trial defense counsel to become more active in the appellate process and more enthusiastic at trial.

³⁰² These intermediate appellate tribunals should have jurisdiction over any court-martial and should also possess the express power to issue certain extraordinary writs. Their final judgements and decrees should then be reviewable by petition to COMA. To effectively exercise these powers the Courts of Military Review should be decentralized (geographically or by major commands with perhaps some consideration to crossing or mixing service lines) to facilitate disposition of cases and enable trial defense counsel, if requested, to pursue appellate remedies. These appellate tribunals

deprivation of constitutional rights and questions of jurisdiction should not turn on the fortuity of the sentence imposed or the character of the trial court. To insure the independence and status of the Court of Military Appeals the automatic certification rights of the Judge Advocates General should be modified to provide for review on a petition showing good cause. The armed forces would likely object to this change but an examination of past Court opinions indicates a sensitivity to the needs of the military and doctrines already developed have limited this provision.³⁰³ There is little likelihood of harm to the military from this change while its retention could be construed as impairing the constitutional status of the above proposed Court of Military Appeals because of the rendering of advisory opinions.³⁰⁴ If the Court were given Article III status then it would necessarily possess extraordinary powers under the All Writs Act³⁰⁵ and the complementary enforcement powers. If the Court is not made a "constitutional" court then an express statutory authorization of extraordinary powers would be helpful to over-

are in need of greater independence and upgrading which perhaps the maturation of the various military judge programs may provide. In what may be a remarkable phenomenon the 13 judges of the Army Court of Military Review, sitting in 3 judge panels and en banc, from Oct. 71 through Mar. 72 produced no published dissents in 1551 decisions although exercising fact finding and sentencing powers in addition to filling out the vagaries of military law.

³⁰³ See note 263 *supra*.

³⁰⁴ Inasmuch as art. 67(d) purports to limit COMA to issues certified by a Judge Advocate General and art. 67(b) (2) allows a case to be certified even though an accused may not desire to pursue an adverse COMR decision (*United States v. Zimmerman*, 1 U.S.C.M.A. 66, 1 C.M.R. 66 (1952)) the Court could be forced to render an opinion in a less than fully adversary setting and on an issue irrelevant to the disposition of a case. While the Court has sought to avoid such opinions, see note 263 *supra*, the statutory scheme may not satisfy Article III requirements of a "case or controversy" and the prohibition against the issuance of advisory opinions by constitutional courts. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Another possible objection to constitutional status for COMA could be that certain sentences in cases reviewed by it cannot be executed until approved by the Sec. of a Dept. or the President. UCMJ, art. 71. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), the Supreme Court refused to hear an appeal from the Court of Claims on the ground that it lacked judicial power since the Sec. of Treasury could revise certain decisions of that Court. (This provision was repealed and appeals subsequently taken in *DeGroot v. United States*, 72 U.S. (5 Wall.) 419 (1866)). However, insofar as executive action on courts-martial only relates to sentencing and the exercise of clemency powers this objection should not deprive COMA of constitutional status. (The promise by President Nixon to review the Calley case unless meant to be only in the exercise of clemency powers would cast a cloud over military justice).

³⁰⁵ 28 U.S.C. sec. 1651 (1964). See note 264 *supra*.

come the reluctance of at least one judge to use such powers.³⁰⁶ Too much should not be expected from extraordinary writ power in any arrangement as it is somewhat impractical to rely on the highest tribunal in a judicial system to remedy every wrong throughout a global jurisdiction. Other improvements in military justice offer better potential for eradicating the problems which have been a major source of extraordinary writ petitions.³⁰⁷

4. Review by the United States Supreme Court.

In the interest of judicial economy and in order to allow the Supreme Court to be truly the final arbiter of constitutional due process those convicted by courts-martial as well the Judge Advocates General should have the opportunity to petition the Supreme Court on a writ of certiorari from a decision of the Court of Military Appeals on jurisdictional and constitutional issues. Again only tradition and history stand in the way of this procedure.³⁰⁸ The narrowness of present federal court review and the lengthy process of military exhaustion and then petition in federal district courts imposes not only a hardship on a military defendant but also represents an inefficient use of judicial time and resources.³⁰⁹ Assimilation of the Court of Military Appeals into the federal judiciary and the right to petition the Supreme Court would eliminate these hardships and inefficiencies.³¹⁰ Servicemen today would not have to

³⁰⁶ See dissenting opinion of Chief Judge Darden in *Collier v. United States*, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970).

³⁰⁷ See notes 298-302 *supra*.

³⁰⁸ Although the Supreme Court has recognized and fostered the concept of independent judicial systems it has also hinted that Congress could confer appellate jurisdiction for it to review courts-martial. See *Noyd v. Bond*, 395 U.S. 683, 694 (1969) (opinion of Justice Harlan). Even if COMA is not accorded Art. III status certiorari to the Supreme Court is still permissible. Court of Claims and Court of Customs and Patent Appeals decisions were reviewed by the Supreme Court before they attained undisputed constitutional status. *DeGroot v. United States*, 72 U.S. (5 Wall.) 419 (1866).

³⁰⁹ See notes 233 and 257 *supra*.

³¹⁰ The potential for delay is manifested in the famous case of *O'Callahan v. Parker*. On July 20, 1956, the offenses for which SGT O'Callahan was tried by general court-martial were committed. He was convicted on October 11, 1956, and sentence approved by the convening authority. An Army Board of Review affirmed his conviction (CM 393590, B.R. (Army) (1957) (not reported)) and the Court of Military Appeals denied his petition for review on March 1, 1957 (7 U.S.C.M.A. 800). SGT O'Callahan was paroled in 1960 but returned to confinement as a parole violator in 1962. *O'Callahan v. Attorney General*, 230 F.Supp. 766 (D. Mass. 1964). On February 23, 1966, a federal district court denied a writ of habeas corpus wherein O'Callahan first alleged the lack of court-martial jurisdiction. *O'Callahan v. Chief U.S. Marshal*, 293 F.Supp. 441 (D. Mass. 1966). In August of the same year another federal court denied a writ of habeas corpus alleging deprivation of

57 MILITARY LAW REVIEW

endure costly and lengthy judicial proceedings if there was a possibility of appeal from the Court of Military Appeals to the Supreme Court. Some resistance to Supreme Court participation in the review of courts-martial can be anticipated from the military although in 1969 The Judge Advocate General of the Army directed a study of legislation to permit review by the Supreme Court in certain cases.³¹¹ The military need not, however, fear Supreme Court interference with its mission. That tribunal has traditionally been hesitant to interfere with congressional and executive control over the military and has been more receptive to claims of military necessity than the Court of Military Appeals.³¹² It is therefore doubtful that the balances already struck between individual constitutional rights and military necessity would be significantly altered by the Supreme Court. At least until the Supreme Court fathomed the realities of military necessity and freed itself from the myth of specialization argument the twenty-one year experience of the Court of Military Appeals would undoubtedly be accorded great weight. Any potential opposition based on a specialization argument can be overcome simply by noting that the intricacies of tax and antitrust litigation are probably more foreign to the Justices than would be the criminal proceedings of courts-martial. The review contemplated would only involve criminal appeals limited

constitutional rights to unanimous verdict, jury, confrontation, and self-incrimination, and a lack of jurisdiction. U.S. *ex rel.* O'Callahan v. Parker, 256 F.Supp. 679 (M.D. Pa. 1966). The Third Circuit affirmed, U.S. *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968), but the Supreme Court reversed in its historic decision. While civilian courts were handling O'Callahan's appeals he petitioned the Court of Military Appeals for *coram nobis* relief based on a deposition taken in violation of Jacoby which was decided three years after his conviction had become final in the military. COMA denied this relief reaching the merits of his case. United States v. O'Callahan, 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967). Had there been an opportunity for O'Callahan to petition the Supreme Court in 1957 his case could have been finally decided 12 years earlier with the saving of four lower federal court actions. If COMA had assumed (or possessed) extraordinary writ power the confrontation issue could have been settled soon after Jacoby in 1960.

³¹¹ Annual Report, 1969, at 21. General Hodson opined that there would not be any undue burden on the High Court.

³¹² C. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (1951). Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of the Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 181 (1962); *Servicemen's Rights*, 64 COLUM. L. REV. 127 (1964). See notes 3 and 5 *supra* and the Japanese Exclusion cases. *In re Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). See generally, M. GRODZINS, *AMERICANS BETRAYED* (1949).

to constitutional and jurisdictional issues not the review of administrative discretion.

The Supreme Court might well object to an increased burden and some commentators have suggested review by Circuit Courts of Appeals in recognition of this objection.³¹³ Such intermediate appellate review is wholly unnecessary and an affront to the considerable efforts of the Court of Military Appeals. In part, this suggestion rests on the unstated and questionable premise that these tribunals would better balance military necessity and individual rights than the present Court of Military Appeals. Review by the several Circuit Courts of Appeals could cause inconsistent judgments which should be minimized in military law and would only add another time consuming process without substantial benefit. Assimilation of the Court of Military Appeals into the federal judiciary and possibility of review by certiorari by the Supreme Court is the more reasonable alternative.

If certiorari to the Supreme Court were made possible there would probably be an initial flood of petitions but only few petitions would be granted. Except for refinement of *O'Callahan* there are few potential jurisdictional questions.³¹⁴ The number of petitions presenting a "constitutional case" would likely be small; the needed grants of certiorari even smaller.³¹⁵ Although the Court of Military Appeals has acknowledged an obligation to follow the Supreme Court on certain issues, the implementa-

³¹³ Benson at 20; Keefe, *Reactions to Current Legal Literature*, 56 A.B.A. J. 188, 193 (1970); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1225 (1970).

³¹⁴ In *Relford v. Commandant*, 397 U.S. 934 (1971) the Supreme Court suggested an *ad hoc* approach to future service connected cases leaving unsettled the retroactivity question *see* note 231 *supra*. The court-martial of reservists (art. 22(3)), retired persons (art. 2(4-6)), and the interpretation of the language in art. 2(10-12) may give rise to some cases.

³¹⁵ What would qualify as a "constitutional case" is unclear. Attacks on the UCMJ would clearly fall within its definition (*see* note 221 *supra*). Justice Douglas in *United States v. Augenblick*, 393 U.S. 348, 356 (1969) observed, "But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are not the measure of the deprivation of constitutional rights. Also limiting the number of cases potentially reviewable by the Supreme Court would be, as previously suggested, the probable reliance on the 21-year experience of COMA. Further, one could reasonably expect the Supreme Court to rely heavily on statutory and manual authority in determining whether to grant cert. During its 1970 term the Supreme Court granted only 7.8% of petitions for certiorari on the appellate docket and 2.0% on the miscellaneous docket in disposing of 3318 cases. *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 344-53 (1971). I would expect equally as low probably lower, grants from COMA decisions.

tion of this proposal is essential to assure constitutional due process for those in the service of their country. The nation's largest and most active criminal jurisdiction should not languish in a second class status.

5. *Miscellaneous Proposals.*

On more than one occasion it has been suggested that the Court of Military Appeals be empowered to review some or all the administrative decisions made by the military and the idea has received serious considerations from congressional committees.³¹⁶ Although an increased number of judges and Article III status would enable the Court to perform such a task reasonably well, the inherent difficulties of concentration of power and the practicalities of distance from petitioners militate against giving the Court this power. Federal district courts should not be divested of their right to review administrative determinations and the military appellate courts should remain criminal in nature. Some have urged that the Court be permitted to make determinations of fact³¹⁷ and render sentence relief³¹⁸ but such powers detract from the efficiency of an appellate process and with the general improvement in military justice are unnecessary. A commissioner of the Court of Military Appeals has recommended that the Court be given the power to formulate the rules of evidence and procedure for courts-martial.³¹⁹ There are two strong arguments against this suggestion. First, although it is the federal practice, it is questionable whether a body that

³¹⁶ See generally, *Joint Hearings Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary and Special Subcomm. on Armed Services on S. 745-62 and 2906-07*, 89th Cong., 2d Sess. (1966); *Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary, United States Senate Pursuant to S. Res 260*, 87th Cong., 2d Sess. (1962). Consideration might also be given to COMA possessing jurisdiction to review the actions of military tribunals other than courts-martial.

³¹⁷ H.R. 3455, 86th Cong., 1st Sess. (1959) (Brooks bill supported by American Legion). The American Legion supported fact finding power for COMA in the original hearings on the UCMJ. *Hearings on S. 857 and H.R. 4080 Before Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 187-88, 195, 199 (1949); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 610 (1949). Sherman, *Civilianization*, *supra*, note 2 at 103.

³¹⁸ Keefe, *JAG Justice in Korea*, 6 CATH. U. L. REV. 1, 12 (1956) (stating that only a civilian tribunal can and would keep the public trust in supervising military justice).

³¹⁹ Feld, *Courts-Martial Practice: Some Phases of Pretrial Procedure*, 23 BROOKLYN L. REV. 25, 26 (1956). See also Keefe, *JAG Justice in Korea*, 6 CATH. U. L. REV. (1956) (suggesting COMA with the assistance of a civilian advisory council should have rule making power similar to that which the Supreme Court exercises in the federal judiciary).

promulgates rules should then be also asked to judge those rules. Secondly, in view of the reality of some military necessity this would be an appropriate place to defer. The executive and the legislature are constitutionally part of the balancing process and their experience and judgment should continue to reflect itself in courts-martial proceedings. That their judgment in the promulgation of the Manual remains subject to judicial review allows for a proper balancing of interests.

C. A HOPE FOR THE FUTURE

While there have been some laudable proposals for the needed restructuring of military justice, the author doubts that any sweeping change will be made in the foreseeable future.³²⁰ The case against military justice as "drumhead justice" is simply not convincing under the contemporary military justice system. Admittedly deficiencies in the system and its administration have manifested themselves,³²¹ but the GI of today faces a far superior system than his counterpart of earlier generations. Any change in military justice is likely to be accomplished on a piecemeal basis and upon urging from within the defense establishment. It is for this reason that the Court of Military Appeals has been selected as a key to the future improvement in military justice. Ironically, the very success of the Court of Military Appeals in upgrading military justice may have created

³²⁰ Several congressmen have introduced bills aimed at further judicializing military justice. S. 1127, 92d Cong., 1st Sess. (1971) (Bayh); S. 4168-4178, 91st Cong., 2d Sess. (1970) (Hatfield); H.R. 2196, 92d Cong., 1st Sess. (1971) (Price); H.R. 6901, 92d Cong., 1st Sess. (1971) (Whalen); H.R. 579, 92d Cong., 1st Sess. (1971) (Bennett). These proposals are explained and discussed in Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AMER. CRIM. L. REV. 9 (1971); Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455 (1971); Sherman, *Congressional Proposals For Reform of Military Law*, 10 AMER. CRIM. L. REV. 25 (1971).

³²¹ See, F. GARDNER, *THE UNLAWFUL CONCERT: AN ACCOUNT OF THE PRESIDIO MUTINY CASE* (1970) (a vivid and relatively accurate glimpse at the typical AWOL soldier and his battle with the system); R. Sherill, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970) (a journalistic look at some of the more celebrated court-martial cases of the Vietnam war); Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the UCMJ*, 81 HARV. L. REV. 1697 (1968) (examination of the Howe case); Sherman, *First Amendment Rights*, *supra* note 183. West, *The Command Domination of the Military Judicial Process Part II*; Aug. 10, 1969 (unpublished thesis presented to George Washington University Law School, Washington, D.C.).

the biggest obstacle to its revitalization³²² for there is little pressure to change a system that is working reasonably well and much better than its predecessors.

The Court of Military Appeals is perhaps guilty of some paternalism and a tendency toward hyperbole in describing its accomplishments, but not wholly without justification. The Court has struggled for recognition as a part of the federal judiciary but remains frustrated in the quest for that status. The very assumption of extraordinary writ power was a bold step and its relative disuse is a function of its limited original jurisdiction, not of an insensitivity to the needs of the military accused. The *Jacoby-Tempia* philosophy developed by the Court radically altered the common perception of the constitutional rights of servicemen. However, the Court has recently become less active. Some of the notable exercises of a general supervising role over the administration of military justice have been substantially distinguished.³²³ The concepts of prejudicial error and the presumption of regularity have found new vitality.³²⁴ The

³²² One unstated practical obstacle to the complete judicialization of COMA is possible conflict between the congressional armed services and judiciary committees. Military justice legislation and the passing on appointments to the Court has been handled by the Armed Services Committees. Before passing on the UCMJ the Senate was asked to allow the Judiciary Committee to review the bill but that motion was defeated by a vote of 43 to 33. 96 CONG. REC. 1414, 1417 (1950). The Military Justice Act of 1968 was, however, successful in large part due to the efforts of Senator Ervin and his Senate Judiciary Subcommittee on Constitutional Rights. See Ervin, *The Military Justice Act of 1968*, 5 WAKE FOREST INTRA. L. REV. 223 (1969) reprinted in 45 MIL. L. REV. 77 (1969). The granting of Article III status to COMA would presumably bring it within the domain of the Judiciary Committees. Hopefully, congressional tradition and friction would not impede the continued improvement of military justice.

³²³ Compare *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (establishing specific guidelines for guilty plea inquiries by military judges), with *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971) (guilty plea found informed and voluntary notwithstanding failure to advise accused of his waiving three important constitutional rights; Ferguson, J. dissented). Compare *United States v. Donohew*, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969) (decreting that every record of trial should show the accused was advised of his rights to counsel under art. 28(c)), with *United States v. Whitmire*, 21 U.S.C.M.A. 286, 45 C.M.R. 42 (1972) (purpose of Donohew held achieved notwithstanding failure of military judge to make personal inquiry of accused's understanding of his rights to counsel). *CF.* *United States v. Lenox*, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972, overruling *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969) (erroneous denial by service Secretary of conscientious objector claim could provide a defense to disobedience of a subsequent dependent order)).

³²⁴ *United States v. Hubbard*, 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971) (dissenting opinion of Darden, C.J., on prejudice in speedy trial); *United States v. Jenkins*, 20 U.S.C.M.A. 112, 42 C.M.R. 304 (1970) (no prejudice found where military judge failed to inquire into accused's understanding of

raison d'être for this trend lies not only in changes in judicial personnel³²⁵ but also in the maturation of military justice under the UCMJ and in the Court having reached the limits of its original congressional mandate and powers.

There is always some disparity between the broad principles of law promulgated in appellate court decisions and the daily application of those principles in the field. A healthy skepticism, by higher tribunals, particularly in the military setting, is essential to keep reasonable the gap between theory and practice. While the Court of Military Appeals cannot guarantee by itself the successful functioning of the military justice system its activism can assure the continued vitality and development of the nation's largest criminal jurisdiction. Unless the Court obtains the independence, the personnel, the powers, and the prestige that it needs it may very well grow stale reclining on its past success. Thus, it is hoped that all, or at least some, of these proposals for a revitalized United States Court of Military Appeals will become realities. Whether adopted or not, the push for the improvement and restructuring of military justice should not stop.

trial by judge alone despite requirement of para 53d(2)(b), MCM); *United States v. Johnson*, 21 U.S.C.M.A. 270, 45 C.M.R. 44 (1972) (unrealistic presumption that convening authorities read records of trial; see particularly dissenting opinion of Duncan, J.); *United States v. Montgomery*, 20 U.S.C.M.A. 35, 42 C.M.R. 227 (1970) (military judges sitting alone presumed to properly distinguish irrelevant and immaterial evidence).

³²⁵ Chief Judge Darden came to the bench in late 1968 replacing Judge Kilday and Judge Duncan succeeded Judge Ferguson on November 29, 1971. Aside from differences in background and philosophy the very fact that Judges Darden and Duncan joined the court 18 and 20 years after the UCMJ became effective may color their view of military justice. Observing a system working reasonably well in the majority of cases as opposed to those judges who witnessed and encouraged the transition from World War II to modern military justice may explain a narrower concept of prejudicial error and an increased reliance on the presumption of regularity. Whereas COMA functioned for close to 15 years with the activist, though not always agreeing, Quinn-Ferguson tandem the recent work product of the Court is plainly influenced by the more cautious Chief Judge Darden. The author's informal accounting shows the present Chief Judge in partial or complete dissent with the opinion of the Court in only 20 out of the last 242 published opinions (from beginning of October Term 1970 through middle of 1971 Term). Since Judge Duncan's ascension to the Court Chief Judge Darden has only twice in 86 decisions been in disagreement with the result reached by the Court (January through 23 June 1972).

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MY LAI AND VIETNAM: NORMS, MYTHS AND LEADER RESPONSIBILITY*

By Captain Jordan J. Paust **

Former Nuremberg prosecutor Telford Taylor has stirred discussion of the law of war with his suggestions that high American officials may have been guilty of war crimes in Vietnam. In rebuttal, the author examines the current state of the law regarding such issues as leader responsibility, population relocation, guerrilla status, and aerial bombardment. In large measure he finds that American action has not breached existing legal standards. However, he does encourage a rethinking of existing standards and emphasizes the need for more intensive training of combatants in the laws of war.

I. INTRODUCTION

"Freud views the atrocities of war as more natural than the civilized behaviour of man," and "what we call 'peace' is, apparently, a period during which forces both psychic and material are dammed up."¹

What a pessimistic outlook at first blush, but if this is true it is perhaps not the ultimate fate of mankind to continue to wage war in disregard of certain international rules which have been developed to control violence and competitive destruction and to limit the sufferings of the victims of war. It is more likely, the author believes, that mankind can and will have to constantly guard against the excesses of individuals, groups, or governments in their treatment of fellow human beings.² As the new Army film, "The Geneva Conventions and the Soldier,"

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹Colby, *War Crimes*, 23 MICH. L. REV. 482, 626 n.213 (1925) quoting MCCURDY, *THE PSYCHOLOGY OF WAR*. See also, *Is there a Bit of Calley in Us?*, LOOK, Jun. 1, 1971, at 76-77.

²For a suggested social response in the form of a new Commission on Human Rights in Armed Conflict, see Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, publication forthcoming.

points out,³ "War sometimes brings out the best in man—charity, compassion, self-sacrifice. Too often it brings out the worst—cruelty, brutality, sadism," and in war it is usually harder "to do the right thing than the wrong thing." Nevertheless, as the film emphasizes, the human society rightfully expects that a soldier's and a civilian's conduct during armed conflict shall conform to certain basic normative precepts known as the international law of war.

It shall be the purpose here to identify some of these basic precepts and to relate them to questions of leader responsibility for violations of the law of war in Vietnam. The relevant comments of Telford Taylor in his recent book, *Nuremberg and Vietnam: An American Tragedy*,⁴ will be utilized throughout as points of focus, but, unlike the book, this article will not attempt to prove that criminal responsibility exists for past conduct of certain officers or leaders. For such conclusions the reader will have to attach his own factual data to the law as ironed out in this inquiry—for it is the law which this article seeks to identify, not proof of criminality. Similarly it shall not be the purpose of this article to prove that war crimes were not committed in Vietnam by United States forces, South or North Vietnamese forces, or those of the Viet Cong or others. That would be an impossible task and would render the article as useless as the wildly conclusionary writings which state that war crimes occurred each day and in all areas of Vietnam or that we are all legally guilty of those crimes which have been committed. Instead the task is formidable enough for we will attempt to identify all of the prominent myths that have found a certain acceptance among some of the members of the public and also among certain writers who should be more attuned to the differences between law and myth or politicized conclusion. These myths must be explored, not to exculpate brutality, but to put law and criminality in proper perspective.

Some of us may find it difficult to realize that immorality and inhumanity are not always reflected as illegality; but it is crucial to perceive law as objectively as possible if we are to advance beyond an *ad hoc* emotive response and finally engage in a constructive crime prevention or rights protection program. Those

³ See *My Lai Prompts New Training Film, Soldiers Get Vivid Lesson on Geneva Code*, Los Angeles Times, Apr. 26, 1971, at 1 and 12; and *What Army is Doing to Prevent Another My Lai*, U.S. NEWS & WORLD REPORT, Apr. 12, 1971, at 6. The present author was a Pentagon adviser on this film.

⁴ T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (1970) [hereinafter cited as TAYLOR].

of us who are quick to judge sometimes ignore the fact that men are both good and bad whether they are of our nationality or that of the enemy. Similarly, we sometimes fail to realize that both a legally justifiable war and legally justifiable conduct during war (or during peace) can cause suffering, destruction and death which men of concern find reprehensible and frightening. The real evil is war itself, but we must retain a tight focus on fact and the actual state of the law if we are to end these wars and achieve the maximum humanitarian aims in cases where armed violence occurs. Anything less would leave all of us unprotected in the future.

These are difficult realizations to make, but ones which are necessary if we are to utilize our greed, fear, prejudice, frustration and hostility to advantage by an open confrontation and by guarding each other against our own excesses. We cannot use God, fate, technology, the leniency of courts, or imaginary Hitlerian leaders as scapegoats if we are to move beyond rationalized apathy and attempt to realize the social achievements of a preventive law or rights protection program. Nor can we draft new treaties and rely on the law to protect us from ourselves. We have the ultimate responsibility and mankind must seek constructive social responses since men will apply or break the law and human beings must ultimately receive the proper education, training and guidance to attenuate the evils of violence and make human rights more effective.

We cannot engage in a confusion of law and morality where humanity needs more than a moral or legal judgment to start that social achievement; and a tedious reexamination of law, human rights and political interplay is necessary if we are to move beyond rule formulation and judgment to actual implementation and protection. Moral concern is important in this regard, but obfuscation of law through moral suasion can cause us to lose the opportunity for a cooperative breakthrough in law effectiveness. There is another danger inherent in an apocalyptic mixing of morals and law, for if we tie legality to individualistic and temporal morality we are close to losing whatever law or restraint we have, and we will fail to tighten the law where it is deficient as a proper guide to social conduct.

The need to differentiate between law and morality or even myth is why this article will begin with an inquiry into the nature of international law and its relation to politics and the contemporary terminology of "community expectation." From

this background the inquiry proceeds through some of the basic myths which permeate the literature on My Lai and the conduct of the Vietnamese war. The reader may not always find security in the state of the law, but security is not my purpose. Indeed, if anything is clear from this focus it is that there is a tragic lack of awareness of the nature of human rights in times of armed conflict and the general rules of warfare in this country and in other nations around the world.

II. THE BASIS OF HUMAN RIGHTS AND INTERNATIONAL LAW

At the outset we must not forget that as lawyers we must guard against normative formulations which have no relation to reality or expectations. Hall early warned:

It would be very unwise of an international lawyer to indulge in the delusion, with which he is often credited, that formulas are stronger than passions.⁵

Of course, this warning does not preclude the use of a formula which itself is based on the identifiable community "passions" for law and justice; nor does it require a disillusionment with the law and the attribution of an exaggerated role to naked power.⁶ The problem for the international lawyer, however, lies in the identification of shared legal expectations and, then, in the inquiry as to the responsiveness of a particular formula to those expectations.

While law must reflect the public expectations, this does not mean that legal decisions are to be purely political in nature. In fact, a political decision has none of the permanence, authoritativeness or acceptance one associates with law and should not be confused with it. Politics is oriented toward the present and the principles of ruling, government and control or a regulation of conduct which sometimes fails to reflect an authoritative or constitutive base (law being social regulation but having an authoritative or constitutive base). Politics is majoritarian in focus (ideally) rather than being responsive to all of the interests common to all of the members of society (i.e., including the common interests of the minorities or "out" groups). In contrast, community expectations might be considered as those common to nearly all of the members of the human community.

⁵ HALL, *INTERNATIONAL LAW*, preface (3d ed. 1890).

⁶ See M. McDUGAL, F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER*, 3-4 (1961), on the role of "authority" [hereinafter cited as McDUGAL].

and our focus here should concern those which also contain an authoritative base in the shared expectation of legality or a common expectancy of the existence of rights and duties as opposed to pure aspirations as to what the law should be.⁷

The reader should note that Telford Taylor would seem to allow an intellectual confusion to come into existence in the identification of law or legal norms. He would apparently substitute common opinion or political passions for legal, authoritative norms.⁸ Furthermore, there is room for further confusion in his message, since individual opinions and passions are given great importance even when in contradiction to those of the community,⁹ thus allowing proper investigation of conduct to turn, perhaps, into a witch-hunt. It is simply not true that "[t]hat's what the Nuremberg Trials were all about."¹⁰ In fact, it would be so incredulous to attribute an attitude that individuals may,

⁷ See I L. OPPENHEIM, *INTERNATIONAL LAW*, 8-9 (8th ed. 1955), for the views that conscience and morality lack the authoritative base of legal expectation, and that the power to make law lies in "the common consent (or expectation) of the community" [hereinafter cited as OPPENHEIM].

⁸ TAYLOR, at 13-14, stating, "the term 'Nuremberg trials' should not be taken as limited to the precise rulings . . . but in its broad sense . . . [including] the ideas they have generated. . . . [Nuremberg is] both what actually happened there and what people think happened, and the second is more important than the first."

The dangers which can result from the confusion of law and morality can be appreciated after reading a rather poor review of Telford Taylor's book in Wasserstrom, *Criminal Behavior*, New York Times Book Review, Jun. 3, 1971, at 8. The review obfuscates law, misconstrues Telford Taylor's statements (see *id.* at 11 and 12), and demonstrates unfamiliarity with the international law of war plus circular thinking concerning the nature of law as exemplified in the reviewer's conclusion that conduct which is not criminal is nevertheless a "crime" (apparently under the reviewer's private morality—the community morality is nowhere defined). The danger of a purely emotive response may also be seen in the works of Professors Richard Falk and Tom Farer where both at times seem to confuse law and morals as well as to make certain statements of a conclusionary nature unsupported by any factual analysis. References to Professor Farer's recent work appear in this article. For some of Richard Falk's regrettable obfuscation and conclusionary statements, see *CRIMES OF WAR* (R. Falk, G. Kolko, R. Lifton, eds. 1971) (an otherwise valuable contribution). The editors' statement provides, for example, a conclusion that "the commission of war crimes is a *normal* incident of military behavior. . . . [S]ome GIs . . . will be punished *solely* to shield both our leaders and the general citizenry . . . *mainly* to sustain an image of *self-righteousness* and decency." *Id.* at xi. (Emphasis added.) Another conclusion is that torture is *routine* (*id.* at 5). We cannot focus on myth and morals, nor can we allow the expressions of those unfamiliar with the actual content of the law (or those who hide it in their works) to guide our inquiry. There is a danger in losing the law we have if we are to ignore law and settle for the moral judgment of a few individuals.

⁹ TAYLOR at 15-16.

¹⁰ *Id.* at 16, stating that a citizen can decide for himself what the law requires on the basis of what "he believes to be wrong."

for themselves, decide what the law provides to one who was involved with the prosecution of Nazi war criminals that such a statement will not be considered here as reflective of Telford Taylor's views of the nature of law, legal rights and duties, or the constitutive process of authoritative decision-making. Though the passions of small groups are sometimes strong they do not necessarily represent the state of law or even reflect the legal expectations of the community; and strong passion certainly does not justify conduct in violation of normative legal precepts.¹¹ Furthermore, it is critically important to try to separate law from myth, morals or politically pregnant notions of fact if we are to improve the law and make it more effective; critically important because an obfuscation of law would be fatal to community efforts to obtain and identify effective guides for decision-makers and actor conduct.

We should not forget, however, that common human *aspirations* can become human *expectations* and, thus, the basis for authoritative implementation as human *rights*. Furthermore, shared expectations can develop into legal norms to govern conduct even in the absence of specific legislative acts of implementation where the consensus as to the existence of the norm is fairly complete.¹² In the same manner the specific legislative acts of the past can be expanded upon by the norm creating process of community expectations.¹³ This expansion or even change can be found in general or localized practice designed to be in conformity with the developing principles of international law,¹⁴ though all practice is not norm creating or norm changing.¹⁵ The existence of legal rules in the absence of codal pre-

¹¹ One need only consider the mass murders during World War II, the murders of defenseless people at My Lai, or the thought of allowing the KKK free hand at murder in the South to be convinced of the lack of legal justification found in any strong passion for the violation of normative precepts. Society demands something more of its disagreeing factions than a resort to violence, and rightfully so for in no other way can the interests of minorities or any individual freedom survive.

¹² See, *eg.*, I OPPENHEIM at 15-19.

¹³ See TRIAL OF THE MAJOR WAR CRIMINALS, Nuremberg, Germany, at 221 (1946), stating, "This law is not static, but by continual adaptation follows the needs of a changing world." See also, I OPPENHEIM at 8, stating, "the law can grow without being expressly laid down and set by a law-giving authority."

¹⁴ See I OPPENHEIM at 26, distinguishing between *custom* which is associated with the expectation of legality, and political *usage* without such an expectancy base.

¹⁵ See T. FARER, THE LAWS OF WAR 25 YEARS AFTER NUREMBERG (1971) at 12, stating that the "operational substance of norms is derived from the behavior and attitudes of the entities whose relations they stabilize. . . . It is

cision has been consistently recognized by the courts¹⁶ and text writers;¹⁷ indeed, it has been recognized by international "legislators" themselves.¹⁸

For example, one of the customary portions of the law of war, the Hague Convention No. IV,¹⁹ states in the preamble that it was not possible to create regulations covering all the circumstances which might arise in practice, but:

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

Similarly the 1949 Geneva Conventions recognize the existence of normative precepts not as readily identifiable as those of the Conventions, but of binding validity. The Conventions state that the parties to the armed conflict "shall remain bound to fulfil" obligations created "by virtue of the principles of the law of nations, as they result from the usages established among civil-

the old conundrum of whether behavior should be interpreted as deviant or creative, precedent-shattering or precedent-establishing. This is an inveterate problem of any legal system, but one particularly onerous for a system lacking centralized and specialized institutions for systematic clarification and revision of the law." See also TAYLOR at 29.

"See, e.g., United States v. List, 11 TRIALS OF WAR CRIMINALS 757, 1248 (1948); and *Ex parte Quirin*, 317 U.S. 1, 28-30 (1942).

"See, e.g., I OPPENHEIM at 7.

"The term "legislators" is used here in a general sense. The author recognizes the lack of an international "legislature" as such, but disagrees with any view that legislation in the general sense is lacking. The law of war has a partial "source" in treaties though pushing semantic differences any further here would not be useful. Compare I.C.J. STAT. art. 38, para 1, I OPPENHEIM at 27-29, and U.S. DEPT OF ARMY, LAW OF LAND WARFARE, para 4 (FIELD MANUAL 27-10, 1956) [hereinafter cited as FM 27-10], with TAYLOR at 29.

"Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as H.C. IV]. This convention has since grown to the status of being customary international law as recognized at Nuremberg. See FM 27-10, para 6.

"H.C. IV, preamble.

57 MILITARY LAW REVIEW

ized peoples, from the laws of humanity and the dictates of the public conscience."²¹

Further recognition of the above principles can be found in our history. In *The Paquete Habana*, the United States Supreme Court made the often quoted statement:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.²²

Also of importance is the language found in *Ex parte Quirin*:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.²³

The Court stated in *In re Yamashita*²⁴ that Congress had adopted "the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention. . . ."

As early as 1865 the United States Attorney General wrote to the President that "Congress has the power to define, not to make the laws of nations . . . but (Congress) cannot abrogate them . . .," and that the laws of war "exist and are of binding

²¹ *Sec., e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 158 (1956), 6 U.S.T. 3516, T.I.A.S. No. 3365; 75 U.N.T.S. 287 [hereinafter cited as the Geneva Civilian Convention]. These conventions have not been declared as customary international law and binding on nonsignatories (except so far as common article 3 provides). Yet the fact that almost every nation in the world has signed them is of some importance (perhaps of more importance to the minority of scholars who believe that obligations only arise from the express consent of a nation).

²² *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also I.C.J. STAT. art. 38, para 1. For a similar British practice see *Triquet v. Bath*, 3 Burr. 1478, 96 Eng. Rep. 273 (K.B. 1764) before Lord Mansfield.

²³ 317 U.S. 1, 27-28 (1942). See also *Henfield's Case*, 11 F. Cas. 1099, 1107-1108 and 1120 n.6 (No. 6,360) (Pa. 1793).

²⁴ 327 U.S. 1, 8 (1945).

force upon the departments and citizens of the Government, though not defined by any law of Congress."²⁵ Furthermore, it was stated:

Congress, not having defined, as under the Constitution it might have done, the laws of war, we must look to the usage of nations to ascertain the powers conferred in war, on whom the exercise of such powers devolve, over whom, and to what extent do those powers reach, and in how far the citizen and the soldier are bound by the legitimate use thereof.²⁶

In view of the United States practice herein cited, it is simply not true that "international law, except as embodied in treaties to which we are a party, is not part of the 'supreme law of the land,'" or that "the Court would have no authority, under the supremacy clause, to rely on doctrines . . . or any other general international law principles."²⁷ In fact, the Supreme

²⁵ 11 Ops. ATT. GEN. 297, 299 (1865). See also FM 27-10, para 511, stating that international responsibility exists though domestic law imposes no penalty.

²⁶ *Id.* at 300. See also *Ex parte Quirin*, 317 U.S. 1, 28 (1942) at 28, stating, "By the Articles of War, and especially Article 15 [1916], Congress has explicitly provided . . . that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases," and at 29, stating, "It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns."

²⁷ See TAYLOR at 114-15. *Contra*, FM 27-10, paras 7(b) and (c), and 505(e). Beyond the fact that customary international law and the general principles of law recognized by civilized nations are also part of the supreme law of the land through Article VI, § 2, of the Constitution, it is extremely important to realize that certain fundamental rights of men (popularly termed "natural rights" around 1791) were retained by the people of the United States as specifically declared in the Ninth and Tenth Amendments. See *Griswold v. Connecticut*, 381 U.S. 479, 487-93 (1965) (concurring opinion). There can be no doubt that those fundamental rights of the people exist; there are merely problems of interpretation of those rights. Those rights, like other constitutionally recognized rights, must have an evolving meaning drawn from the "traditions" and "collective conscience" (or shared legal expectations) of our people. See *id.* at 493; *Trop v. Dulles*, 356 U.S. 86, 101 (1958); and *Weems v. United States*, 217 U.S. 399 (1910). Interpretation of those fundamental rights of men is a proper judicial function, and for that purpose a court could find evidences of shared fundamental legal expectations in declarations, practice, court decisions, legislation, the writings of legal scholars and in universally accepted standards of human rights. In utilizing fundamental human rights as a means of interpreting the nature of the rights which already exist and are retained by the people under the Ninth and Tenth Amendments, a court would not violate principles concerning political questions or self-executing treaties since the rights already exist and are merely being interpreted through the use of evolving standards of tradition and shared legal expectation. The court would not select the mode of implementation but merely define the right and it could, in conformity with judicial function, strike down modes already selected by the political bodies

Court has concluded that it has such authority.²⁸ Furthermore, as we have seen, the fact that normative legal precepts are not all defined with codal precision does not mean that they do not exist to bind conduct or to provide for punishment of violations.

III. THE GROWTH AND CODIFICATION OF THE LAWS OF WAR

A. GENERAL DEVELOPMENT

Telford Taylor is keenly aware of the military tradition and the long history of human expectation associated with conduct in war. He knows, further, that the Nuremberg trials or even the 20th Century codifications were not the original source of the community precepts known as the law of war, and that it is important to correct such misconception:

for it distorts the entire matter by concealing the antiquity of these vexing questions, and the depth to which they permeate the moral and political history of mankind. . . . Nuremberg is but one of many points of reference in the course of men's efforts to use law as a vehicle for mitigating the ravages of war, and eventually abolishing war itself.²⁹

He knows also that the law of war is not based solely on the Christian ethic, but a universal ethic; and that the concept of individual responsibility did not start with prosecution in the Leipzig trials in Germany after World War I. But there exists an unawareness generally of the historic basis of community expectation in this regard; and some who seemingly bathe in unawareness have even suggested that to prosecute a person who violates the law of war is to make the accused a scapegoat. Certainly this is a confusion of terms in that "scapegoat" implies a sacrifice of an innocent thing; and conjures up confusion as to individual guilt and responsibility. In exploring the history of expectation we would do well to keep this in mind.

In the history of man there are many expressions relevant to our inquiry. Some concerned the unrestrained who slaughtered

which are determined to be substantially inconsistent with the right which exists. See, e.g., *Griswold v. Connecticut*, *supra*, where the Court struck down a politically selected mode for being substantially inconsistent with fundamental rights (while not defining the particular way in which the political body should affirmatively guarantee those rights by legislative or other action). Of course, where there is no legislation and also no "shared" expectation or consensus among the people, the court would not only be dealing with something which was not a "fundamental right," but would also be operating in an area of political function where no discoverable standards of juridical utility exist.

²⁸ See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900).

²⁹ TAYLOR at 17: see also 20, 32, and 59-67.

any who did not please them.³⁰ Other expressions noted a community or domestic concern for the ravages of warfare and indiscriminate suffering. Standards for the regulation of violence found expression though enforcement of the norms was not always possible.³¹ In the Middle Ages there existed a body of rules for the conduct of war known in Europe as the *law of arms*. It was based in part on the notions of chivalry and the belief in a common brotherhood of soldiers which transcended national boundaries and allegiance. So great was its influence that knights could go to the courts of the enemy to enforce the law of arms against an enemy violator—usually for the payment of money. Furthermore, a true soldier would not surrender without a fight and a brave soldier's life was usually spared but the coward or violator of promises was sentenced for breach of the law of arms or treason to his knighthood by his own king or anyone who caught him.³² There were also condemnations concerning the use of certain weapons such as the crossbow, arbalest, harquebus, musket and poison gas;³³ and the Church played an important international role in that regard.³⁴ But these formula-

³⁰ See, e.g., I Samuel 15:3 and Deuteronomy 20; LIVY, A HISTORY OF ROME, 291 (Modern Library ed. 1962); L. MONTROSS, WAR THROUGH THE AGES (3d ed. 1960), citing the humanitarian order of Charlemagne (806 A.D.) at 95, and in contrast the statement of Jenghiz Khan (1162-1227 A.D.) at 44, stating, "The greatest happiness is to vanquish your enemies, to chase them before you, to rob them of their wealth, to see those dear to them bathed in tears, to clasp to your bosom their wives and daughters" (see Freud, *supra* note 1); I WRIGHT, A STUDY OF WAR (1951), at 135; WALKER, A HISTORY OF THE LAW OF NATIONS (1899); KENT'S, COMMENTARY ON INTERNATIONAL LAW (1866); and LEVIE, *Penal Sanctions for Maltreatment of PWs*, 56AM. J.I.L. 433-36 (1962).

³¹ See works cited above and C. FENWICK, INTERNATIONAL LAW (1965), stating, at 7, that the Greeks had developed an elaborate code based on universal law but that they did not seem to always follow their own developed norms and that paradoxically it was a "barbarian" Persian King Xerxes who, upon learning that the Greeks had murdered some of his envoys, replied to a suggestion of retaliation, that the Greeks had violated the law of all mankind, and that he would not do that very thing which he blamed on them. See also W. WINTHROP, MILITARY LAW AND PRECEDENTS 778 n.22 (2d ed. 1920) [hereinafter cited as WINTHROP], quoting phrases of Charles I and Sweden's Gustavus Adolphus of the early 17th Century. See also PHILLIMORE, III COMMENTARIES UPON INTERNATIONAL LAW (3d ed. 1879-1889); and KENT'S COMMENTARY ON INTERNATIONAL LAW, 241-42 (1866), concerning the orders of another Persian King Cyrus.

³² See KEEN, THE LAW OF WAR IN THE LATE MIDDLE AGES (1965). The limitation of conflict to warrior classes was also practiced in other "feudal" or "civilized" societies such as the ancient Chinese, 10th Century Japanese, the 15th-16th Century Incas, and earlier Mayas (613 B.C.-630 A.D.), to name a few. See I Q. WRIGHT, A STUDY OF WAR, 577, 584 (1951).

³³ See, e.g., MAINE, INTERNATIONAL LAW 138-40 (2d ed. 1894); and C. FENWICK, INTERNATIONAL LAW 667 (1965).

³⁴ See *id.* and TAYLOR at 64.

tions were not enough to limit unnecessary suffering in war. Perhaps these social expectations are only commensurate with the development of the value of human beings for there seems no need to limit suffering unless some value is recognized in the individual or a pervading mutual self interest is demonstrated to combatants.

In viewing a past in which horror predominated in war (and war itself predominated) we should not conclude, however, that the absence of effective international implementation and enforcement meant that there was no law. Furthermore, we should not conclude that the extent of law is to be measured in the extent of enforcement when it is recognized that law does exist.³⁵ The problem lies rather in the identification of community expectations which permeate the history of man and the determination of whether the pronouncements of the past are to be considered authoritative historically despite the failures in practice and the infrequency of trials.

In considering the history of expectation and the lack of effective enforcement machinery it might be helpful to focus on the 13th Century practice of issuing letters of reprisal. In 1295 Edward I authorized "one Bernard Dongresilli, a citizen and merchant of Bayonne but not an officer of the crown," to engage in reprisal action against Portugal. The authorization was an example of enforcement of normative expectations through authorized private action. There were ten recognized conditions to the legality of private reprisal and one involved a demand for satisfaction.³⁶ The "system" of reprisal was considered to be a legitimate means of securing justice after every other practical means had failed (but the ten conditions had to be met). It was actually a regulated implementation of the talion law with normative requirements to be followed. The use of these letters of

³⁵ One such author seems to be the 18th Century thinker VAN BYNKERSHOEK, *A TREATISE ON THE LAW OF WAR* (Du Ponceau trans. 1810), stating, at 2-3, that every force is lawful in war including the death of defenseless people except perfidy, and that "generosity is altogether a voluntary act." This voice seems revived in the pre-World War II German *LAWBOOK ON LANDWARFARE*: "By steeping himself in military history the officer will be able to guard himself against excessive humanitarian notions," cited at Colby, *War Crimes*, 23 MICH. L. REV. 482, 509 (1925). One would agree with the positivist oriented Van Bynkershoek that law must reflect reality. But it seems to the present author that reality includes the identifiable human pronouncements and beliefs, which must be analyzed along with practice, to decide if there were legal expectations admittedly not always fulfilled. Public expectations can today have as much or more of an effect on the positivist oriented decision-maker as past political practice.

³⁶ See Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J.I.L. 694 (1933).

reprisal also demonstrates the fact that there *were* community expectations, even though they were not always formulated with the precision of a code, and that unilateral enforcement action following accepted standards was resorted to and legitimate in the absence of an authoritative international body created for that function. Reprisals were not founded upon a policy of anarchistic vengeance any more than the original talion law or the early Roman adaptations for expectation enforcement which utilized a ritualistic demand for satisfaction of wrong and justice,³⁷ and a limited or responsive unilateral action if satisfaction was refused. Much of this jurisprudentially oriented past conduct demonstrates a long history of basic expectations though admittedly it lacks fulfillment except in cases where one group has been able to unilaterally force reparation or punishment upon another. Today we are probably at the same level of development concerning international law since we have demonstrated expectations or law but lack effective enforcement machinery.

In fact, there were very few trials of a multinational character prior to Nuremberg. But the lack of trials should not be considered as a community denial of law nor of individual responsibility for a violation of that law. One author has stated that the reason why there were few trials in the 18th-19th Centuries was not due to any theory of individual immunity from law or sole responsibility resting with the state (the old object/subject confusion), but in the practice of nations at the time to include an amnesty clause in peace treaties or formal declarations.³⁸ Individual responsibility was recognized, but amnesty specifically granted, until after World War I when members of the community of nations began to demand enforcement against individuals by other states.³⁹ This view lends consistency to sporadically demonstrated criminal responsibility and is important in defeating the notion that such responsibility began only with the World Wars of the 20th Century.

³⁷ See LIVY, A HISTORY OF ROME, *supra* note 30 at 45, concerning an early ritual for demanding satisfaction for injury and a stated ritual for war—probably both very similar in form; and see LIVY 1.24.329 for a ceremonial form of peace treaty. These rituals were probably the result of the practice to allow controlled retaliation (talion) rather than uncontrolled aggression (anarchy) which disturbs the overall relation between men and gods, and may well be connected with the goddess Diana and both of these with the roots of western civilization's concept of "justice."

³⁸ Gross, *The Punishment of War Criminals*, II NETHERLAND I.L. REV. 356 (1955).

³⁹ *Id.*

In this context we can better understand the trial of Peter von Hagenbach in 1474 for the improper administration of the pledged territories on the Upper Rhine.⁴⁰ The Archduke of Austria ordered the trial of the Burgundian von Hagenbach before actual war in 1476, so it is hard to label the case as a normal "war crimes" trial. However, a multi-group tribunal of twenty-eight judges from allied towns found von Hagenbach guilty of murder, rape, perjury and other crimes said to constitute violations of the "laws of God and man." Von Hagenbach raised the defense of obedience to superior orders and asked for adjournment to obtain confirmation, but the defense was denied as contrary to the law of God. Von Hagenbach was deprived of his knighthood for committing crimes that a knight had a duty to prevent and was then executed with an order, "Let justice be done." It really does not matter much whether the tribunal was in the strict sense an "international" and "war crimes" tribunal, for the trial sufficiently demonstrates a community consensus, not incompatible with the law of arms, in connection with the improper administration of trust or mandate territory. In the historic inquiry, that consensus is more important than pessimistic viewpoints on the state of an international governmental or enforcement system.

B. THE AMERICAN COMMITMENT TO THE INTERNATIONAL LAW OF WAR

The American experience demonstrates how widespread that consensus was in the late 18th Century, for this nation was founded with a basic respect for international law. Indeed, during the Revolutionary War itself, the American Congress showed "great solicitude to maintain inviolate the obligations of the law of nations, and to have infractions of it punished in the only way that was then lawful, by the exercise of the authority of the several states."⁴¹ When the federation became stronger, "Congress, claiming cognizance of all matters arising upon the law of nations, professed obedience to that law 'according to the general

⁴⁰ See TAYLOR at 81-82; and SCHWARZENBERGER, II INTERNATIONAL LAW 462-66 (1968).

⁴¹ KENT'S COMMENTARY, *supra* note 30 at 427, citing 7 Journals of Congress 181; and see Wright, *The Law of the Nuremberg Trial*, 41 AM. J.I.L. 38, 259, n.66a (1947). "The Continental Congress of the United States in several resolutions adopted, from 1779 to 1781, called upon States to provide for punishment of offenses against the law of nations." British soldiers had been tried in a colonial court for the Boston Massacre and defended by John Adams who obtained an acquittal.

usages of Europe.'"⁴² An earlier Congressional Resolution had imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court-martial."⁴³ That power was exercised by a Board of General Officers appointed by General Washington to convict Major Andre of the British Army as a spy in violation of "the laws of war."⁴⁴ In 1794 Congress further defined "the setting on foot of a military expedition from American territory against a friendly country (fillibustering) as an offense against the law of nations."⁴⁵ One year earlier the federal courts took jurisdiction over an offense against the law of nations involving the violation of principles of neutrality by a civilian, stating that though there had been no exercise of the power conferred upon Congress by the Constitution in this matter, the federal judiciary has jurisdiction.⁴⁶ There were also Congressional denunciations of the killing of our soldiers as a "gross and inhuman violation of the laws of nature and nations," and similar denunciations concerned the crime of violence against noncombatants.⁴⁷

During the War of 1812, some stragglers from the American Army in Upper Canada needlessly burned some buildings at St. David's. The U.S. commander was summarily dismissed from the service. For a similar occurrence at Long Point the commander was "brought before a military inquiry by his own government [U.S.]"⁴⁸ And in 1818 there occurred the famous court-martial and execution of two Englishmen, Arbuthnot and Ambrister, for

* KENT'S COMMENTARIES, *supra* note 30, at 3, *citing*, Ordinance of Dec. 4, 1781, 7 *Journals of Congress* 185. See also, U.S. CONST. Art. 1, Sec. 8, cl. 10. For prisoner practice see REPORT, EXCHANGES OF PRISONERS DURING THE AMERICAN REVOLUTIONARY WAR (Mass. Hist. Society 1861).

* Resolution of August 12, 1776, cited at Warren, *Spies, And the Power of Congress to Subject Certain Classes of Civilians To Trial by Military Tribunal*, 53 AM. L. REV. 195 (1919).

* See Glueck, *By What Tribunal Shall War Offenders Be Tried?*, 56 HARV. L. REV. 1059, 1064 n.13; Green, *The Military Commission*, 42 AM. J.I.L. 832 (1948); and TAYLOR at 21.

* Wright, *The Law of the Nuremberg Trial*, *supra* note 41 at 246, *citing* 18 U.S.C. § 25 (1794).

* Henfield's Case, 11 F. Cas. 1099 (No. 6,360) (Pa. 1793); see also Paust, *After My Lai—The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971). See *United States v. Jones*, 26 F. Cas. 653 (No. 15,494) (Pa. 1813), concerning the Congressionally implemented international crime of piracy.

* See WINTHROP at 791 n.14, 788 n.21, and 780 n.31.

* Colby, *War Crimes*, 23 MICH. L. REV. 482, 501-02 (1925). See Joint U.S., British Commission investigation of maltreatment of U.S. POWs and repatriation made in WHARTON'S DIGEST, *infra* note 49, at 331-32; and the denunciation of the burning of the Capitol and President's residence by President Madison in 1814 as a gross violation of the laws of war. *Id.* at 335-36.

conduct as "accomplices of the savages" in carrying on war against the U.S. in a manner contrary to the laws and usages of war, and also in that "one of them was the mover and promoter of the war, which, without his interference and false promises to the Indians of support from the British Government, never would have happened." ⁴⁹ Arbuthnot was charged and found guilty of: (1) exciting the Creek Indians to war against the U.S., and (2) aiding and comforting the enemy, and supplying them with the means of war. A murder charge was withdrawn as not within the jurisdiction of the tribunal. Ambrister was charged and found guilty of levying war against the United States by taking command of hostile Indians and ordering a party of them to give battle. General Jackson approved the findings and increased the punishment despite vocal opposition both at home and abroad. The text comments that this was "savage" warfare incited by the defendants whereby wives and children were brutally massacred, referring to an incident in 1817 when a boat of soldiers and their families was captured and survivors scalped while children were "snatched by the heels and their heads crushed by being dashed against the boat." ⁵⁰ The incitement and complicity were further described as an example of inciting to armed violence against the law of nations the population of one territory (Spanish Florida) against that of another (the U.S.). ⁵¹ Today we might describe such conduct as crimes against peace, humanity, and the law of war in general. ⁵²

There was widespread public anger in Britain against the American trial, but the British Ministry stood behind the decision, "*disregarding the first clamors of a powerful press, and first erroneous impulses of an almost universal public opinion,*" which might have led to war. ⁵³ Jackson also stood behind the decision though his political opposition made the trial "a party issue" and "one the chief grounds of opposition to General Jackson's elec-

⁴⁹ See WHARTON'S III DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, 326-29 (1886).

⁵⁰ *Id.* at 327-28.

⁵¹ *Id.* See also President Jefferson's 4th Annual Message in 1804, quoted in WHARTON'S DIGEST, *supra* note 49, at 339.

⁵² Note that Wright, *supra* note 41 at 267 n.102, lists many examples of trials of persons "for initiating or contributing to the initiation of aggressive war in antiquity" (emphasis added). See also *id.* at 244 n.14, citing numerous articles on "aggressive war."

⁵³ *Id.* at 329.

tion and to his subsequent administration." ⁵⁴ America stood firm behind her early convictions of the need to follow the law of nations. During the Mexican War (1846-1848), in which "the behavior of our troops on foreign soil afforded instruction worthy to be pondered," members of the U.S. forces were rendered amenable to the law of war by virtue of General Scott's General Order No. 20.⁵⁵ However, the trials of Mexicans for breaches of the law of war seem to have outnumbered those of Americans.⁵⁶

The Civil War brought with it the adoption of the 1863 Lieber Code and the use of the military commission for the trial of enemy belligerents and combatant and noncombatant civilians for offenses against the law of war.⁵⁷ U.S. troops were also tried and convicted but the records are scarce.⁵⁸ In 1865, however, an important pronouncement of present relevance was made:

Under the Constitution and laws of the United States, should a commander be guilty of . . . a flagrant breach of the law . . . (he) would be punished after a military trial. The many honorable gentlemen who hold commissions in the army of the United States . . . would keenly feel it as an insult to their profession of arms for any one to say that they could not or would not punish a fellow-soldier who was guilty of wanton cruelty to a prisoner, or perfidy towards the bearers of a flag of truce.⁵⁹

Apparently superior officers felt that these crimes of violence were more than mere insults to the profession, for Article 44 of the 1863 Lieber Code provided:

"Of course, the opposition failed and General Jackson showed rare courage of conviction in the finest of American tradition which we would do well to emulate today. The trial had generally been criticized for lack of due process rather than the unjustness of the result.

⁵⁴ Colby, *War Crimes*, 23 MICH. L. REV. 482, 502 (1925); and Colby, *Courts-Martial and the Law of War*, 17 AM. J.I.L. 109, 111 (1923).

⁵⁵ Compare WINTHROP at 832 with *id.* at 795 n.51; and see 14 OPS. ATTY. GEN. 249, 251 (1873).

⁵⁶ See also, WINTHROP at 796, 778-79, 780, 784, n.57, 787, and 791-92, last cited concerning the trials of Captain Wirz, Mr. Duncan and Major Gee for the maltreatment of prisoners. See also DIG. OPS. OF THE JAG, ARMY, 1067 n.6 and 1070-72 (1912); 11 OPS. ATTY. GEN. 297 (1865); and DIG. OPS. OF THE JAG, ARMY, 132, 133-41 and 245-48 (1866). Concerning the granting of amnesty see WHARTON'S DIGEST, *supra* note 49 at 325.

⁵⁷ See Note, *U.S. Navy War Crimes Trials* (1945-1949), 5 WASHBURN L.J. 89, 91 (1965); DIG. OPS. OF THE JAG, ARMY, 462 469, para 1694 (1901); and Lieber Code, arts. 11, 13, 37, 44, 47 ("if committed by an American soldier") and 71 ("Whoever . . . whether he belongs to the Army of the United States, or is an enemy . . ."). The general nature of the Lieber Code, itself evidencing customary international law, showed the punishment orientation as well as a preventive law approach.

⁵⁸ 11 OPS. ATTY. GEN. 297, 303-04 (1865).

57 MILITARY LAW REVIEW

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

American trials after the Civil War were few or hard to discover. In 1868 there was a state prosecution of a civilian for murder based on international standards of culpability,⁶⁰ and in 1873 there was a military tribunal conviction of some Modoc Indians for law of war violations.⁶¹ The 19th Century saw a few other foreign trials for violations of the laws of war,⁶² but the early 20th Century saw many more.⁶³ As earlier stated, before World War I most felt it sufficient to have the law of war enforced by each nation's own military system,⁶⁴ and the Americans were no exception since the trial of soldiers and civilians was preferred in a U.S. court-martial.⁶⁵

During the conflict in the Philippines, a reported forty-four officers, soldiers and "camp followers" were tried for "cruelty, looting and like crimes" in a two-year period. Major Waller was acquitted for killing eleven Filipinos partially on the basis of superior orders and the defense of not knowing that the orders were illegal because of Article 82 of the Lieber Code (seemingly allowing summary execution). Brigadier General Jacob Smith was convicted on the charge of "conduct to the prejudice of good order and military discipline" and his sentence of a reprimand and retirement from the service was upheld by President Theo-

⁶⁰ *Minnesota v. Gut*, 13 Minn. R. 341 (315), 356 (Minn. 1868). John Gut was convicted for the murder of Indians after they had been captured and imprisoned; it was not a defense to the charge that he was emotionally upset due to the loss of his best friend at the hands of the particular Indians. Cf. lack of trials for the Sand Creek massacre, *infra* note 241, or the Indian massacre at Wounded Knee, S.D., in 1890, by U.S. troops, ROBINSON, *A HISTORY OF THE DAKOTA OR SIOUX INDIANS* (1904).

⁶¹ See 14 OPS. ATTY. GEN. 249 (1873), punishing the acts through Congress had not made them a crime by statute. See also WINTHROP at 786 and 788 n.91.

⁶² See MUNDO & STOWELL, II INTERNATIONAL CASES 222 (1916); WINTHROP at 843 n.35; and an 1807 Scottish case cited at Dunbar, *Some Aspects of the Problem of Superior Orders in the Law of War*, 63 JURID. REV. 234, 238 (1951).

⁶³ *E.g.*, a Russian court-martial of two Japanese officers; *Regina v. Smith* (1900), reported at Stephen, *Superior Orders As Excuse for Homicide*, 17 L.Q. REV. 87 (1901); see TAYLOR at 24; the Leipzig trials of 1921, see TAYLOR at 24, 16 AM. J.I.L. 674 (1922); and MULLINS, *THE LEIPZIG TRIALS* (London 1921); and French and British prosecutions after World War I, see Colby, *War Crimes*, 23 MICH. L. REV. 482, 496-97, and 504 (1925), citing cases, and at 487 stating that some war criminals had been shot without trial.

⁶⁴ Colby, *supra* note 1 at 500.

⁶⁵ See Colby, *Courts-Martial and the Laws of War*, 17 AM. J.I.L. 109, 111-13 (1923).

dore Roosevelt.⁶⁶ What is little known is that charges were dropped against an Army captain after he left the service because (1) the court-martial had no jurisdiction over an ex-serviceman, and (2) because a military commission lost jurisdiction upon the proclamation of peace.⁶⁷

Since then, prosecutions of U.S. troops for violations of the law of war have been in military fora and generally for violations of our domestic law as in prosecutions for military offenses under the present Uniform Code of Military Justice. Trials occurred during World War I⁶⁸ and World War II, but it would be difficult to compile an accurate record due to the labeling of cases by military offense title, e.g., the killing of civilians as a domestic murder prosecution even though probably also a violation of the law of war. The record keeping does not seem to have improved. One interesting case was *United States v. Aikins and Seevers*,⁶⁹ in which the defendants were convicted of murder in violation of the law of war, the law of belligerent occupation to be exact. The defendants' terms of enlistment had expired and a court-martial could not then exercise normal jurisdiction over them due to discharge from former status. Prosecution was based on Articles 12 and 15 of the 1916 Articles of War (similar to the present UCMJ, articles 18 and 21), which allowed a prosecution based on an offense against the law of war.

Similarly during the Korean War there were prosecutions under the UCMJ for offenses likely to have been violations of the law of war as well, specifically the law of belligerent occupation.⁷⁰ By coincidence or design the result in the *Aikins* case was repeated during the Korean War in the case of *United States v. Fleming*.⁷¹ Prosecution for offenses against the law of war was allowed despite discharge from a prior enlistment.

⁶⁶ See Greider, *The Point Where War Becomes Murder*, Wash. Post, Oct. 11, 1970; and *Vietnam Precedents in a Filipino Insurgency*, Wash. Post, Apr. 13, 1971, at A18.

⁶⁷ 24 OPS. ATT. GEN. 570, 571 (1903).

⁶⁸ As a clue to U.S. prosecutions see U.S. ARMY, TRAINING MANUAL 27-250, *Cases on Military Government*, 79-80 (GPO 1943), stating that crimes did occur, became of considerable concern, and that in 1919 orders were issued for the reporting and investigating of all allegations. No evidence of trials appear here. Many of the WW II cases are still classified. See also Taylor, *Nuremberg and Vietnam: Who Is Responsible for War Crimes?*, III THE VIETNAM WAR AND INT'L LAW 379 (1972).

⁶⁹ 5 B.R. 331, 360-61 (ABR 1949).

⁷⁰ See, e.g., prosecutions for murder, rape, robbery of civilians in occupied territory: *United States v. Hanson*, 1 C.M.R. 141 (ABR 1951); *United States v. Rushing*, 1 C.M.R. 328 (ABR 1951); and *United States v. Abraham*, 1 C.M.R. 424 (ABR 1951). See also Greider, *supra* note 66.

⁷¹ 2 C.M.R. 312, 315, 318 (ABR 1951).

In Vietnam the practice has been to prosecute under the UCMJ.¹² It was recently disclosed that some 60 servicemen have been convicted of murdering civilians in Vietnam out of 117 charged,¹³ and that sentences were reduced in 247 cases of other crimes (unknown number) against Vietnamese civilians.¹⁴ At least one trial resulted in a finding of guilty on a charge of "cutting off an ear from the body of an unknown dead Viet Cong soldier, which conduct was of a nature of being discredit upon the Armed Forces of the United States as a violation of the Law of War."¹⁵

In view of the American commitment to international law demonstrated in the long history of condemnations and prosecutions of even our own soldiers and civilians, it is not proper to argue that the trial of anyone in the 1970's for war crimes is unfair or unprecedented. Indeed, we should now expect this nation to enforce the law—America deserves no less.

IV. MYTHS AND NORMS CONCERNING THE LAWS OF WAR IN THE VIETNAMESE CONTEXT

A. THE MYTH OF POLITICAL EXCUSE

Recognizing that customary international law is binding on belligerents in the conduct of war,¹⁶ one might ask whether parties to a conflict can disregard customary or even treaty norms when it is in their political interest to do so? In answering this question, it must be emphasized that *there can be no legal acceptance of political excuses for the denial of community expectations and obligations*. This is due to the fact that international legal norms have a universal character or value content, and these human expectations cannot be ignored on the basis of local self interest. For example, there can be no legal acceptance of North Vietnam's pursuance of unilateral "choices" based on political considerations (rather than legal norms) relative to the treatment of United States prisoners of war in their custody. If North Vietnam attempts to classify U.S. airmen as "war criminals" and then disregard both international obligations of a cus-

¹² See *U.S. Admits Violations of Geneva Code in Treatment of PWs*, Philadelphia Inquirer, Nov. 2, 1969, at 2; and FM 27-10, para 507(b).

¹³ In the *Uproar over Calley's Conviction*, U.S. NEWS & WORLD REPORT, Apr. 29, 1971, at 20, stating that the Army has tried 81 (38 convicted of murder, 20 of lesser crimes, 23 acquitted), the Marines have tried 28 (18 convicted), the Navy has tried 5 (3 convicted), and the Air Force has tried 3 (2 convicted of lesser offense).

¹⁴ *21 in Cases Like Calley's Had Their Sentences Cut*, New York Times, Apr. 13, 1971, at C8.

¹⁵ *United States v. Passantino*, Hq. 1st Inf. Div. Special Court-Martial Order No. 11, 11 Feb. 1968.

¹⁶ See TAYLOR at 30; and FM 27-10, paras 4(b), 6.

tomary nature and those to which it has expressly consented, merely to pursue a political end, the international community cannot accept such attempts and should rightly condemn them. International law is based upon common expectations of the human community and does not solely become operative when in conformity with one state's notions of "just wars" or other political conclusions of a nation. Additionally, it should be noted that public opinion polls in one state cannot legally justify a political decisions not to carry out international obligations.⁷⁷

It was early recognized that kings have the right to punish not only those injuries committed against themselves or their subjects directly, but also those injuries in violation of the law of nations in regard to any persons whatsoever. This right existed primarily because subjection by the king had replaced the individual's right to enforce the law.⁷⁸ Today, as the human society is forced to exist on the basis of the sovereign state system it can be argued that it is the duty of the sovereign to execute the community legal expectations.⁷⁹ Since we are forced to live with armed conflict, it should be the duty of belligerent powers, based on the social relationship, to follow the law of war and to punish the violators of that universal law since they are not accessible to the human society through any effective governmental structure

⁷⁷ See Wright, *The Law of the Nuremberg Trial*, 41 AM. J.I.L. 38, 59 n.74 (1947), stating, "If an interest is 'protected by international law' every state is obligated by international law not to authorize, and to take due diligence within its jurisdiction to prevent, acts which would violate that interest." See also, McDUGAL, *supra* note 6. See also II GROTIUS, DE JURE BELLI AC PACIS 253 (C.E.I.P. ed., Kelsey trans. 1925); and E. DE Vattel, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE 163 (C.E.I. P. ed., Fenwick trans. 1916).

⁷⁸ Wright, *supra* note 77 at 57 n.66. Cf. private causes of action in tort for violations of the law of nations are recognized and institutionalized under federal court jurisdiction in 1 Stat. 73, 77 (1789). This is an apparent exception to the old subject-object confusion concerning the individual's rights in an international context.

⁷⁹ See *id.* at 60 concerning the split of opinion prior to the 1949 Geneva Conventions as to whether punishment was required or favored under international law. The United States position seems to have been that prosecution or enforcement of the law of war is required. See, e.g., WINTHROP at 796; KENT'S COMMENTARY ON INTERNATIONAL LAW, 3 and 427 (1866); and FM 27-10, para 506(b), stating that the duty to prosecute and enforce the law found in the principles in the 1949 Geneva Conventions "are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces" (emphasis supplied). See U.S. DEP'T OF NAVY, LAW OF NAVAL WARFARE, para 330(a) (Change 2, 1955), stating, "Belligerent states have the obligation under customary international law to punish their own nationals who violate the laws of war."

other than one where the state predominates. With the power lies responsibility.

This particular responsibility to enforce the law was explicitly recognized and consented to by almost every nation in the world in the case of certain violations of the international law of war. Contrary to the opinion of Telford Taylor,⁸⁰ the 1949 Geneva Conventions recognized a specific means of enforcement of the law of war in the domestic tribunals of the parties to the Conventions. Furthermore, the Conventions make it obligatory for any signatory to punish any person, even its own national, who has committed a "grave breach" of the Conventions.

Article 146 of the Geneva Civilian Convention reads:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.⁸¹

Furthermore, Article 1 of the same Convention states that the "High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."⁸²

Assuming that conduct amounts to a "grave breach,"⁸³ there is

⁸⁰ TAYLOR at 28.

⁸¹ Art. 146, Geneva Civilian Convention.

⁸² Art. 1, Geneva Civilian Convention (emphasis added). See also XX1st International Conference of the Red Cross, Resolution X (Istanbul, 1969), deploring any refusal to apply and implement the provisions of the Geneva Civilian Convention in its entirety. See also U.N. CHARTER art. 55, para. c. and art. 56.

⁸³ See, e.g., Geneva Civilian Convention, Art. 147. For a discussion of the Geneva Conventions and the term "grave breach" as it relates to war crimes and to the My Lai massacre see Paust, *Legal Aspects of the My Lai Inci-*

no exception to the duty to search for violators; there is no exception to the duty to prosecute⁸⁴ or extradite⁸⁵ to a High Contracting Party which has made out a prima facie case against an accused violator. There is no power to grant immunity from prosecution, and it is doubtful whether the granting of immunity for war crimes would be consistent with the fact that these are universal crimes and should be governed by universal standards.

There are many evidences of the principle that domestic laws or juridical acts cannot dissipate international criminal responsibility. For example, the Allied Control Council Law No. 10 (31 Jan. 1946) provided in Article II.5 that no statute of limitation, pardon, grant of immunity or amnesty under the Nazi regime would be admitted as a bar to trial or punishment.⁸⁶ Recently the United Nations General Assembly stated that no statutory limi-

dent—*A Response to Professor Rubin*, 50 ORE. L. REV. 138 (Feb. 1971), reprinted 3 THE VIETNAM WAR AND INTERNATIONAL LAW 359 (R. Falk ed. 1972).

⁸⁴ See Esgain & Solf, *The 1949 Geneva Convention Relative to the Treatment of Prisoners of War: Its Principles, Innovations and Deficiencies*, 41 N.C. L. REV. 537, 579 (1963); and IV PICTET, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 587 (1958) [hereinafter cited as IV PICTET] ("grave breaches" should not remain unpunished—need for "universality of punishment"); 592 ("any person" who committed a grave breach shall be the subject of domestic legislation for prosecution purposes); 593 (duty "to ensure that the person concerned is arrested and prosecuted with all speed"); and see 587 n.1, citing III FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 42 (1949), which refers to an obligation to extradite or prosecute "all persons committing or ordering to be committed such grave breaches" (emphasis added). For an unsupportable view that the Conventions allow a unilateral grant of immunity see Comment, *Punishment for War Crimes: Duty—or Discretion?*, 69 MICH. L. REV. 1312 (1971) (this comment was not international in focus, misconstrues international normative values, and oversimplifies the issues in a biased fashion). Note that Mr. Paul Meadlo was granted "immunity" under the authority of the 1970 Organized Crime Control Act. See N.Y. Times, Dec. 4, 1970, at 4, col. 7; and N.Y. Times, Jan. 12, 1971, at 1, col. 1. There is presently no system for a binding or authoritative international grant of immunity utilizing community values and criteria. When we realize that immunity for universal crimes cannot properly fall within the sovereign prerogative and the abuses which could be made of unilateral grants of immunity, we begin to realize the need for an international system to handle these matters. Note that even UCMJ (art. 43) contains no statutory limitation for murder or offenses against the law of war punishable under articles 18 or 134 (or, for that matter, any offense outside articles 119–132 unless otherwise specified in article 43).

⁸⁵ Cf. Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 AM. J.I.L. 433, 456 (1962); and see Harvard Research, *Extradition*, 29 AM. J.I.L. 32 (1935), for a split of opinion as to whether extradition in general is favored or required.

⁸⁶ See 15 TRIALS OF THE WAR CRIMINALS 25 (1949).

57 MILITARY LAW REVIEW

tation would apply to war crimes, crimes against humanity, or genocide.⁸⁷ The Principles of the Nuremberg Charter and Judgment recognized that governmental orders cannot free a person from criminal responsibility (so governmental acts could hardly do the same), and that even though domestic law "does not impose a penalty for an act which constitutes a crime under international law it does not relieve the person who committed the act from responsibility under international law."⁸⁸ And in 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties took note of the rule that "no trial or sentence by a court of the enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States."⁸⁹ An example of the same reasoning can be found in the French case of *Abetz*⁹⁰ where it was held that diplomatic immunity was not relevant to a war crimes prosecution since the legal basis of prosecution rests with offenses against the community of nations and as such any domestic interference through grants of immunity would "subordinate the prosecution to the authorization of the country to which the guilty person belongs."

A local grant of immunity could well be no more in conformity with community expectations than a refusal to prosecute for some other reason. A more serious problem would involve "fake" prosecutions which were designed to result in lesser crime convictions or in an acquittal where it is known that more serious

⁸⁷ U.N. G.A. Res. 2391 (XXIII), adopting the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, article 1 (1968) (vote: 58/7/36; against were: U.S., U.K., S. Africa, Portugal, Honduras, El Salvador, Australia). See also HUDSON, INTERNATIONAL TRIBUNALS 85 (1944), stating, "No statute of limitations exists in international law to bar the presentation of disputes or claims. . . ."

⁸⁸ Principles II and IV, Principles of the Nuremberg Charter and Judgment, 1950 I.L.C. Yrbk. (II), Doc. A/1316, p. 374; adopted by U.N. G.A. Res., 5 U.N. GAOR, Supp. 12, U.N. Doc. A/1316 (1950).

⁸⁹ Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties 9 (1919). Members were: U.S., British Empire, France, Italy, Japan, Belgium, Greece, Poland, Roumania, Serbia.

⁹⁰ 46 AM. J.L.L. 161, 162 (1952) (French Cour de Cassation, 1950). See also III MANUAL OF MILITARY LAW, *The Law of War on Land*, 95 n.2 (British War Office 1958), stating that no *refuge* is possible in a state which is bound by the Conventions and that a state cannot *exonerate* itself or others for violations. Consider the diplomatic immunity granted U.S. servicemen under the Agreement for Mutual Defense Assistance in Indochina with Cambodia, France, Laos, and Vietnam, Dec. 23, 1950 [1952] 3 U.S.T. 2756, T.I.A.S. No. 2447, art. IV. Query whether diplomatic immunity of this sort covers offenses against the law of nations. Certainly no state or group of states can grant immunity for international crimes.

charges could not be proven but the decision is made to prosecute unprovable higher offenses so that the defendant ultimately avoids conviction for the commission of other offenses. Furthermore, a refusal to prosecute can be a violation of the international obligations under the Conventions (1) to bring to trial *all* persons alleged to have committed or ordered to be committed "grave breaches" of the Conventions, (2) to take such measures necessary for the suppression of all acts contrary to the provisions of the Convention other than grave breaches, and (3) to *respect* and to *ensure respect* for the Conventions in all circumstances. The violation of such obligations on the part of the United States or North Vietnam would most likely be violations by the state itself, though this subject shall be considered later in connection with individual criminal responsibility for a failure to execute the law and to suppress violations since individuals may be guilty as well.

A further inquiry here concerns the duty of a High Contracting Party to enact "any legislation necessary to provide effective penal sanctions" for grave breaches of the Conventions.⁹¹ The United States had adopted the 1949 Geneva Conventions with the views of the Department of Justice in mind. The Justice Department stated that:

A review of existing legislation reveals no need to enact further legislation in order to provide effective penal sanctions for those violations of the Geneva Conventions which are designated as grave breaches.⁹²

The present author concurs in that view,⁹³ but in 1962 it was challenged in at least one law review article.⁹⁴ In 1966 and 1967 the United States official position at the United Nations was that Congress has the power, and has from time to time exercised that power, to enact legislation for the creation of military tribunals for the trial of offenses against the law of war.⁹⁵ This could be interpreted as stating that no need for further legislation exists since Congress can create a forum for effective penal sanctions and then prosecute within that forum the offenses which already

⁹¹ See Art. 146, Geneva Civilian Convention.

⁹² *Hearing before the Committee on Foreign Relations on the Geneva Conventions for the Protection of War Victims*, U.S. Senate, 84th Cong., 1st Sess., Jun. 3, 1955, at 58.

⁹³ *Supra* note 46. New legislation might be useful for clarity.

⁹⁴ *Levie, supra* note 85 at 454-57.

⁹⁵ United States Reply of 23 February 1966 to the Secretary General, U.N. Doc. E/CN. 4/927/Add. 1 at 28-31 (1967); and United States Reply of 19 January 1967 to the Secretary General, *id.* at 31.

57 MILITARY LAW REVIEW

exist under the law of war. Furthermore, in 1967 the United States said:

The Uniform Code of Military Justice provides, in article 18, that "General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." Thus, the law of war is incorporated into United States military law. The law of war includes the provisions of the 1949 Geneva Convention which became part of United States law upon its adherence.⁸⁸

This can be interpreted as stating that United States law, by Congressional enactment, has already implemented the law of war and that offenses against the law of war as implemented become violations of the laws of the United States.⁸⁷ Furthermore, the statement does not preclude jurisdiction in another forum.⁸⁹

Extradition of an individual by the United States requires a treaty and specification as to the crime charged,⁹⁰ and usually requires that the offense be common to the United States and the foreign jurisdiction. One view of importance in our inquiry is that Articles 146 and 147 of the Geneva Civilian Convention themselves fulfill all of those requirements and in fact contain provisions constituting a self-executing extradition treaty within the meaning of 18 U.S.C. § 3184 which complies with the customary extradition safeguards as well. If this view is correct it is relevant to the fulfillment of international obligations under the 1949 Geneva Conventions to prosecute or extradite persons who have committed or ordered grave breaches of the Conventions.

It may also be noted that there is no double jeopardy, a com-

⁸⁸ United States Reply of 19 January 1967 to the Secretary General, *id.* at 31.

⁸⁹ See *Ex parte Quirin*, 317 U.S. 1, 27-30 (1942); *In re Yamashita*, 327 U.S. 1, 7-8 (1945); *United States v. Schultz*, 1 U.S.C.M.A. 512, 519-523, 4 C.M.R. 104, 111-114 (1952); *Hammond v. Squier*, 51 F. Supp. 227, 232 (D. D.C. 1943); *Colepaugh v. Looney*, 235 F.2d 429, 432-33 (10th Cir. 1956); *cf. Toth v. Quarles*, 350 U.S. 11, 13 n.4 (1955), not precluding jurisdiction over civilians for an actual violation of the laws of war prosecuted under the Uniform Code of Military Justice, arts. 18 and 21, 10 U.S.C. §§ 818 and 821 (Supp. IV, 1968) [hereinafter cited as the UCMJ]. See also Judge Advocate General's School Text No. 4, War Powers and Military Jurisdiction, at 29 (1943), stating, "A military commission is a criminal war court used as an instrumentality for the more efficient execution of the war powers vested in Congress and the President. It is used primarily for the trial of civilians for offenses against the laws of war." For a detailed consideration of these points, see Paust, *supra* note 46.

⁹⁰ See UCMJ art. 21 and *supra* note 95.

⁹¹ See, e.g., *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

mon law notion, for violations of the law of war in international law for many of the same reasons encountered concerning the grant of immunity from prosecution.¹⁰⁰ An individual may not escape prosecution just because his own nation fails to enforce the law.

Finally, we must recall that in 1969 the United Nations General Assembly adopted a resolution calling upon all states concerned to take the necessary measures for the thorough investigation of war crimes and crimes against humanity, and for the detection, arrest, extradition and punishment of all violators not yet brought to trial or punishment.¹⁰¹ In 1970 the United Nations Economic and Social Council adopted a draft resolution for submission to the General Assembly. The draft considered that the investigation, arrest, extradition, punishment, and the establishment of criteria for determining compensation to the victims are all important elements in the positive, preventive law approach to war crimes and also in the "protection of human rights and fundamental freedoms."¹⁰²

The United States declared in April 1971 that it would not seek to prosecute United States ex-servicemen who have violated the law of war in Vietnam, "because, in the view of some government legal experts, the issue is 'too hot' politically now."¹⁰³ Another reason given was that there was a split of opinion within Executive circles as to whether jurisdiction could be exercised. The doubt led to dropping prosecution efforts altogether,

¹⁰⁰ As an example of this feeling see Commission Report, *supra* note 89 at 9, stating, "but no trial or sentence by a court of an enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States." The members of the commission were: United States, British Empire, France, Italy, Japan, Belgium, Greece, Poland, Roumania, Serbia. See also Art. 86, Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949 (1956) 6 U.S.T. 3316, T.I.A.S. No. 3364; 75 U.N.T.S. 135 [hereinafter cited as Geneva Prisoner of War Convention], which does not allow double punishment of a prisoner of war for the same act or offense. This does not necessarily preclude double jeopardy, and the provision is not one of the enumerated procedural guarantees for a "grave breach" prosecution. See, e.g., Art. 146, Geneva Civilian Convention.

¹⁰¹ G.A. Res. 2583 (XXIV), 15 Dec. 1969; see S.G. Report, Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, U.N. Doc. A/8038 (1970) (XV, agenda item 51). This is in conformity with FM 27-10, para 506(b), see *supra* note 79.

¹⁰² ECOSOC Res. 1500, 27 May 1970, reproduced in S.G. Report, *supra* note 101, at Annex II. See also U.N. GAOR, Supp. 3, at 48, U.N.Doc. A/8003 (1970).

¹⁰³ Viet Trials of Ex-GIs: "Too Hot", Wash. Post, Apr. 13, 1971, at A1; and see Pentagon Can't Find Way to Prosecute Former Soldiers, Wash. Post, Apr. 9, 1971, at A3.

57 MILITARY LAW REVIEW

though the door was left "open to prosecution in the future."¹⁰⁴ This action is apparently a political excuse for law enforcement, since two prosecution forums for ex-servicemen have already been suggested¹⁰⁵ and doubts could be resolved in the courts if the government were interested.¹⁰⁶

The Pentagon declaration raises serious questions concerning the duty to prosecute violations of the general law of war and, more particularly, the "grave breaches" of the 1949 Geneva Conventions as required by that body of treaty law. It, furthermore, raises serious questions concerning the duty to follow and to *insure respect* for the Conventions in all circumstances. There are also serious questions concerning the exercise of state offices in conformity with the public interests or expectations.¹⁰⁷ An inexcusable misuse of public office is operative on the international level when community legal expectations are ignored or flatly rejected. The community can leave to history the judgments as to lack of courage and lack of leadership, but we must not hesitate where there is a lack of responsibility under law.

Blame should not fall exclusively on certain U.S. public officials, however, for it should not be forgotten that an informative silence exists in North Vietnam. We hear of no prosecutions of North Vietnamese soldiers or allies for violations of the laws of war. The lack of investigations into the massacres at Hue in 1968,¹⁰⁸ one month before My Lai, or recently at Duc Duc¹⁰⁹ to

¹⁰⁴ *Id.*

¹⁰⁵ See Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEXAS L. REV. 6 (1971); and Note, *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 957 (1970).

¹⁰⁶ This may be motivated by what Telford Taylor calls the "mere gook rule," see TAYLOR at 162, or another "rule" of uncertain manifestation: "law and order except in Vietnam." No assumption should be made that these feelings exist in the Pentagon—the news articles referred to politics.

¹⁰⁷ See *supra* notes 78 and 79.

¹⁰⁸ See E. HERMAN, *ATROCITIES IN VIETNAM: MYTHS AND REALITIES*, 37-40 (1970); and *Red Atrocities Near Mylai Revealed*, Wash. Post, Feb. 12, 1970, at 33; *Reds Killed 2,900 People in Hue in Tet Offensive*, Wash. Post, Nov. 25, 1969; and U.S. DEP'T STATE, PUB. NO. 8259, *VIETNAM INFORMATION NOTES* No. 7 (E. Asian & Pacific Series No. 162, 1968).

¹⁰⁹ See *The Opposite Side of the Coin*, Chicago Tribune editorial, Apr. 2, 1971; and *Why the Calley Case Opens Up Worldwide Debate*, U.S. NEWS & WORLD REPORT, Apr. 12, 1971, at 6. As an example of further efforts in the terrorist campaign, see, e.g., *Viet Reds Carry War to Civilians*, Baltimore Sun, Apr. 16, 1971, at 2, stating that the previous week had witnessed 325 terrorist attacks with 976 civilians killed, wounded or abducted.

Official estimates of intentional killings of civilian noncombatants by the VC or NVA conclude that approximately 12,000 civilians were murdered between 1958-1966, approximately 20,000 between an overlapping period of 1964-1969, and some 4,600 in 1969. See HERMAN, *supra* note 108 at 14 and

name a few is revealing of North Vietnam's attitude toward legal obligations in the conduct of hostilities, the protection of civilians, the desire to assure basic human rights, and the enforcement of community legal expectations. North Vietnam has consistently refused to carry out its international obligations to apply the law, to allow inspection of prisoner of war camps, to affirmatively seek to prevent violations or to prosecute violators once incidents have occurred. There is a striking similarity in the conduct of North Vietnam and that of Nazi Germany in the attempted denunciation of obligations expressly consented to such as the Geneva Conventions, and in their arguments concerning the required treatment of human beings both at home and abroad.¹¹⁰ What is appalling beyond the similarity is the apparent sincerity of North Vietnam's desire to provide little of the obligatory treatment and to pass that treatment off as "humane" in the face of well developed legal norms and human expectations to the contrary.¹¹¹ We are not talking about the isolated conduct of a few individuals in this regard nor even the treatment of United States prisoners of war alone. We are viewing the official policy of a belligerent which claims to aspire to the "communist" ideal of human dignity (actually a human ideal) while openly rejecting human expectations concerning the treatment of fellow human beings. Let us judge North Vietnam by its deeds and we will see no attempt to fit their conduct into an international

47; and *see id.* at 48 concerning the VC/NVA atrocity in 1967 carried out against the Montagnard village of Dak Son where joint enemy forces burned civilian homes to the ground with flamethrowers, "killing in the process a number of civilians, estimates running from four to 300," with around 70 per cent of the victims women or children. The only attempts at justification of these guerrilla and troop assassinations of civilians seem to lie in the argument that the deaths were a "proper" use of terror and more select than alleged counter assassinations in connection with the allied Phoenix program. Of course, terror assassination or extermination cannot be justified by law no matter how "select." *See also* Wash. Post, Jun. 4, 1972, at 10, col. 2, and May 11, 1972, at 17.

¹¹⁰ For evidence of this conduct, *see generally*, T. FARER, *THE LAWS OF WAR 25 YEARS AFTER NUREMBERG*, at 8 (1971); and HERMAN, *supra* note 108. *See* North Vietnamese Minister of Foreign Affairs letter to the International Committee of the Red Cross, Aug. 31, 1965, 5 *INTERNATIONAL REVIEW OF THE RED CROSS*, 527 (1965); and letter from the National Liberation Front (NLF/VC) to the International Committee of the Red Cross, 5 *INTERNATIONAL REVIEW OF THE RED CROSS*, 636 (1965). North Vietnam ratified the 1949 Conventions in 1957, 274 U.N.T.S. 335-342 (1957); and South Vietnam ratified them in 1953, 181 U.N.T.S. 349-352 (1963). For charges against North Vietnam and the National Liberation Front *see* Levie, *Maltreatment of Prisoners of War in Vietnam*, 48 *BOSTON U. L. REV.* 323 (1968), reprinted in *II THE VIETNAM WAR AND INTERNATIONAL LAW* 361 (R. Falk ed. 1969).

¹¹¹ *See* letters to the International Committee of the Red Cross [hereinafter referred to as the ICRC], *supra* note 110.

social relevance concerning an emerging human civilization but only open defiance of community norms motivated by self interest and dominance attitudes which tend to weaken the international social system and the norms themselves.¹¹² Again, there can be no legal acceptance of political excuses for the denial of community expectations and obligations whether the objections are raised by a communist group or a country which claims to represent the democratic hope of all peoples. There are no political exceptions. Indeed, there is criminal responsibility for the criminal denial of such expectations.

B. THE MYTHS OF GUERRILLA WARFARE

There are two primary myths concerning guerrilla warfare which must be exposed. The first is that guerrilla warfare is new and as such was not considered by the drafters of conventions or did not play any role as an experiential factor in the development of normative legal precepts of the 20th Century. The second misconception is that the guerrilla should not be tied to the rules of warfare—apparently based on the “poor” guerrilla concept that he can come to power by no other means than torture, terror, indiscriminate suffering and murder. The latter is not only a misconception, it is an absurdity and should be denounced for the same general reasons stated relative to any political excuse for the denial of fundamental human rights and principles of law. It should be denounced because such a concept would allow guerrillas to employ measures of violence toward human beings which result in a suffering unacceptable even in war.

A declaration made in a recent report on contemporary problems in the law of armed conflicts identifies the inaccuracy of the first myth:

At present the laws and customs of armed conflicts do not consider guerrilla warfare in particular, but neither do they ignore it. Indeed, the rules concerning the conditions to be fulfilled by irregular forces in order for them to enjoy the status of legitimate combatants concern guerrilla warfare.¹¹³

The report reiterates the view that present rules take into consideration the guerrilla method of fighting and concludes that

¹¹² See I OPPENHEIM at 12. For the view that communist ideology plays a large role in the Soviet conclusions as to the status of individuals, protections to be accorded, and the role of the conclusionary term “just war” in Soviet international justifications and decision-making in conflict with objective human expectations and an emerging social order, see Bracht, *The Law of War and Ideology*, 6 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE, No. 2, at 359-406 (1987).

¹¹³ CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS, 39

these rules prohibit terrorism or the execution of prisoners in any armed conflict even if the combatant is using guerrilla tactics.¹¹⁴ In exposing the inaccuracy of both primary myths we should recall that guerrilla tactics are not new in war. The word itself is of Spanish origin meaning "little war." It arose from the conduct of Spanish guerrillas who in the early 1800's gave Napoleon his first crucial defeat. Of course, the tactics had been used early in the history of man but "brigands" had been outlawed at least since the time of Grotius (1612), Gentili (1620), and Pufendorf (1688). Earlier, Ayala (1582) stated that the old jurists assimilated the brigand with the pirate and that both were regarded as the "common enemy of all," and were subject to punishment by any sovereign.¹¹⁵ Gentili reiterated these views and stated that brigands had "broken the treaty of the human race."¹¹⁶ Furthermore, during the Revolutionary War all combat tactics were not considered legal and it was understood that the killing of prisoners would be considered a "gross and inhuman violation of the laws of nature and nations."¹¹⁷ It was further recognized that individuals could not on their own undertake to wage private war or violence absent state authority,¹¹⁸ that there were limits to allowable suffering, death and destruction,¹¹⁹ and that where laws existed the guerrillas could not disobey them with impunity.

Soon after the country was formed it was still illegal for anyone to incite or engage in treacherous methods of warfare or the indiscriminate killing of men, women and children.¹²⁰ In 1818 there occurred the previously discussed court-martial of two Englishmen, Arbuthnot and Ambrister, for, among other things, conduct as "accomplices of the savages" in carrying on war

(1971). This report is correct in identifying "guerrilla warfare" as a method of fighting rather than a term descriptive of participant status.

¹¹⁴ *Id.* at 41-42.

¹¹⁵ Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 188-89 (1945).

¹¹⁶ *Id.* at 190.

¹¹⁷ See WINTHROP, at 791 n.14, and also at 783-84. Concerning the British response to partisan warfare it is stated that British orders were given in 1776 when they were following General Washington across New Jersey that "the inhabitants who in bands or separately fired on any of the army were to be hanged upon the nearest tree without further process." Colby, *supra* note 1 at 491.

¹¹⁸ President Jefferson, 4th Annual Message, 1804, quoted in III WHARTON'S, DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, 339 (1886).

¹¹⁹ See WINTHROP, at 778-80, esp. 778 n.21; and III WHARTON'S DIGEST, *supra* note 118 at 331-35, concerning the War of 1812.

¹²⁰ See WINTHROP, at 778 n.21, concerning a grave instance of a crime committed by the British forces upon the capture of Hampton, Virginia, in July 1813; *id.* at 783 concerning unprivileged belligerency or the status of irregular guerrillas; and *id.* at 785 concerning the illegal employment of assassins condemned since the age of Vattel (1758), *id.* at 785 n.68.

against the United States in a manner contrary to the laws and usages of war.¹²¹

In 1847 at the Brussels Conference a sharp debate ensued concerning the question of extending protection to irregular units and civilian belligerents.¹²² The debate resulted in the enumeration of certain criteria for lawful belligerent status, but left the question unanswered as to whether those criteria were to be exclusive. However, the Conference never deviated from the view that those who are fighting must adhere to the laws and customs of mankind.¹²³

Guerrilla warfare became widespread in the Mexican War (1846-1848),¹²⁴ but during the American Civil War the debate seemed at an end. Guerrillas operating without commission from their government were denounced and subject to trial as illegal combatants.¹²⁵ The Lieber Code of 1863 stated that men who commit hostilities without commission and who "with intermitting returns to their homes and avocations" divest themselves of the "character or appearance of soldiers," are not entitled to prisoner of war status, and "shall be treated summarily as highway robbers or pirates."¹²⁶ In 1865 reasons for the denial of

¹²¹ WHARTON'S DIGEST, *supra* note 118 at 326-29.

¹²² See Trainin, *Questions of Guerrilla Warfare in the Law of War*, 40 AM. J. I. L. 534, 541 (1946); and SPAIGHT, WAR RIGHTS ON LAND, 51-53 (1911). The Brussels Conference and Declaration were never formally adopted, but were precedent for the 1899 and 1907 Hague Conventions.

¹²³ BRUSSELS CONFERENCE, BLUE BOOK, at 294 (1847); and see Trainin, *supra* note 122, at 543.

¹²⁴ WINTHROP, at 783 n.51.

¹²⁵ Opinion of Keyes to Secretary of War Seddon, November 18, 1863, THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL, 1861-1865, 352, 353-54 (Patrick ed. 1950); and General Orders No. 100, *Instructions for the Government of the Armies of the United States in the Field*, arts. 82 and 84 (1863) [hereinafter cited as the Lieber Code], which was prepared by Dr. Lieber and approved by President Lincoln. The Lieber Code was considered as exemplifying customary law in DIG. OPS. OF JAG, ARMY, 244 (GPO 1866), and though of great importance as precedent for the Hague Conventions it was not the first evidence of the law of war, but as Telford Taylor states it was perhaps the first "systematic, written form" of such law outside of the Brussels works of 1847. TAYLOR, at 21. For other examples of the trial of guerrillas and violators of the law of war since 1848 see Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 117, 208-216 (1945); and for a brief historic background of the qualifications for prisoner of war status and the treatment of guerrilla insurgents in the 19th Century see Veuthey, *Military Instructions on the Treatment of Prisoners in Guerrilla Warfare*, 132 INT'L REV. OF THE RED CROSS 125 (1972) (a partial reprint of a paper delivered at the Int'l Colloquium of the Int'l Inst. of Humanitarian Law, 1971).

¹²⁶ Lieber Code, art. 82. It should be noted that the ambiguity surrounding the word "summarily" was later resolved in favor of the requirement of a trial before any execution of guerrillas; see *infra* note 128.

status and summary treatment were put forward in a manner defeating the notions that guerrilla warfare is new, that the laws of war did not consider guerrilla tactics in the development of positive rules, or that prisoner status was based on jealously guarded aristocratic privilege rather than on fundamental humanitarian concepts.¹²⁷ The Attorney General, in approving military tribunal jurisdiction over certain war crimes prosecutions, stated:

In all wars, and especially in civil wars, secret but active enemies are almost as numerous as open ones. . . . The horrors of war would indeed be greatly aggravated if every individual of the belligerent states were allowed to plunder and slay indiscriminately the enemy's subjects without being in any manner accountable for his conduct. Hence it is that, in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practiced by civilized nations.¹²⁸

These notions were reiterated in 1866 when it was held that "[g]uerrillas are triable by military commission for a 'violation of the laws and customs of war' in the commission of acts of violence, robbery, etc."¹²⁹

In the early 1900's Americans encountered guerrilla warfare once again and Article 82 of the Lieber Code was raised in partial defense of the conduct of Major Waller, who was acquitted of the killing of eleven Filipinos.¹³⁰ The laws of war were recognized as applicable to guerrilla conflict, however, as noted in the United States court-martial and conviction of Brigadier General Jacob Smith.¹³¹ Of further importance at this time were the conviction and execution of two Japanese officers by Russian court-martial in 1904 for disguising themselves as Chinese peasants to blow up a railway bridge in Manchuria during the Russo-Japanese War. Also, the British had gained wide experience with guerrilla warfare in the Boer War (1899-1902) in South

¹²⁷ See FARER, *supra* note 15 at 36-37. Farer attempts to push this claim as the only basis for the denial of prisoner of war status and apparently disregards the need for lawyers to be familiar with the past before making attempts at supportive reference.

¹²⁸ 11 OPS. ATTY. GEN. 297, 306-07 (1865). The opinion also quoted an earlier speech by Patrick Henry in the case of Josiah Phillips at the Virginia Convention as being in favor of the summary execution of banditti who do not follow the law since they are "an enemy to the human name." *Id.* at 306.

¹²⁹ DIG. OPS. OF THE JAG, ARMY, 141 and 246-47 (1866); and see HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR, 174-75 (1866) [hereinafter cited as HALLECK].

¹³⁰ See Greider, *The Point Where War Becomes Murder*, Wash. Post, Oct. 11, 1970, D1, D4.

¹³¹ *Id.*

Africa.¹³² These events all preceded the signing of the Hague Conventions in 1907 which again set forth criteria for prisoner of war status, and specific prohibitions of certain conduct in any war or situation in war, while not mentioning the combatant status of irregulars specifically. Prior to the formation of the 1949 Geneva Conventions nations were aware of the use of partisans and irregulars in France, Russia and Yugoslavia during the Second World War, and of the intentional renunciation for increased effectiveness of prisoner of war rights by Russian guerrillas operating behind German lines.¹³³ Furthermore, the trials of war criminals at the time made no exception for guerrillas concerning the need to follow law and several held that irregulars were themselves war criminals for engaging in such conduct.¹³⁴

In view of this long historic attention to guerrilla warfare it would not be correct to say that the legal norms developed in 1907 and 1949 did not have the benefit of experiential input in connection with guerrilla tactics or that the positive rules thus established can be abrogated by guerrillas or their enemies just because there is no specific mention of the guerrilla experience in the rules themselves. Indeed, it was most likely the intention of the precept formulators not to grant prisoner of war status to irregular combatants, but to insist on certain minimum standards for the humane treatment of such persons and to require that such persons themselves comply with the laws of armed conflict.¹³⁵ Today there may still exist a disagreement as to

¹³² See Vincent, *The Juridical Basis of the Distinction Between Lawful Combatant and Unprivileged Belligerent* 53 and references cited (unpublished thesis, The Judge Advocate General's School, 1959).

¹³³ See DIXON & HEILBRUNN, *COMMUNIST GUERRILLA WARFARE*, 85 (1954). See also WINTHROP, at 783 concerning the Russian *bashi-bazouks*, Italian *condottiere*, and the French *francs-tireurs*.

¹³⁴ See TAYLOR, at 136-37, citing *United States v. List*, "We think the rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the rules of war. Fighting is legitimate only for the combatant personnel. . . . It is only this group that is entitled to treatment as prisoners of war. . . ." Then referring to the conclusion of Richard Falk that an insurgent has "no alternative other than terror to mobilize an effective operation," Taylor states that guerrilla warfare "as waged by the Vietcong . . . is undeniably in violation of the traditional laws of war and the Geneva Conventions." *Id.* at 136.

¹³⁵ See, e.g., H.C. IV, arts. 29-30; Geneva Civilian Convention art. 3, prescribing the rights and duties for all parties to a conflict not of an international character (especially the need for humane treatment and of trials); and PICTET, III COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 49-50, 52, 53 n.1, 61-64 (1960) [hereinafter cited as III PICTET] concerning the historic background and negotiations relevant to the formulation of the 1949 norms in relation to the guerrilla experience. See also IV PICTET, at 51, for the view that nonprisoners of war

whether engaging in an unprivileged belligerency is itself a war crime;¹³⁶ but the fact remains that the killing of suspects without a trial would be murder whether in European wars or at My Lai, Duc Duc and Hue.¹³⁷ This is important to emphasize because some laymen still believe that soldiers can kill suspects or enemy sympathizers without a trial. It is simply not true.

It is interesting to note the recent practice of nations concerning the granting of status and treatment of irregular combatants. In the Algerian conflict and the Kenya uprising of the Mau Mau, France and Britain seem to have granted protected status similar to that given prisoners of war to irregular troops who had generally followed the law of war themselves. Those who had engaged in the indiscriminate use of force were in many cases executed.¹³⁸ Israel seems to have followed the same practice in the 1969 case of *The Military Prosecutor v. Omar Mahmud*

are entitled to normative protections; and see FM 27-10, paras 73, 247-48; and II OPPENHEIM at 215 n.1 and 259-60.

¹³⁶ Compare TAYLOR at 22, stating, "if a noncombatant civilian takes hostile action against the enemy he is guilty of a war crime," with FM 27-10, paras 80-82, stating that nonprisoners of war who commit hostile acts are not entitled to prisoner of war treatment (by definition it seems) and may be tried (for what it does not specify). See also III MANUAL OF MILITARY LAW, THE LAW OF WAR ON LAND, 46-47 (Lauterpacht ed. 1958), stating that illegal combatants may be tried as war criminals. The Soviet approach is that "[t]he laws and customs of war apply not only to armies in the strict sense of the word, but also to levies, voluntary detachments, organized resistance movements and partisans," and that "the laws and customs of war must be observed in any armed conflict." SOVIET INTERNATIONAL LAW TEXTBOOK, INSTITUTE OF LAW, ACADEMY OF SCIENCES OF THE USSR, 423 and 407 (1960).

¹³⁷ See, e.g., United States v. List, 11 Trials of the War Criminals 757, 1250, 1253; II JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 1024-1043, 1087-1092 (1948) [hereinafter cited as II IMT FOR THE FAR EAST]; 11 OPS. ATTY. GEN. 297, 308 (1865), stating that though execution of banditti is proper the commander would be no more than a "butcher of men" if he did not have a tribunal to legally determine guilt; G.C., Art. 147, stating that it is a grave breach to willfully kill or deprive a protected person of a fair and regular trial; and FM 27-10, paras 80-81, necessarily implying the need for a trial. See also G.C., Arts. 3, 33 and 71.

¹³⁸ See FARRER, *supra* note 15 at 39. Ill-treatment of combatants in Laos, Cambodia and Portuguese Angola can be found in numerous articles in the New York Times; see, e.g., *Laotian Generals Concede Prisoners Are Tortured*, New York Times, Oct. 20, 1970; *Grisly Trophies*, Time, Feb. 1, 1971, at 25; and *Portugal's Hazy African Wars Go On, With Only Stalemate in Sight*, New York Times, Aug. 6, 1969. See also, *Ceylon's Police and Army Fight Rebels with Terror*, New York Times, Apr. 25, 1971, at 1, 2, stating that torture, terror, executions and indiscriminate suffering are used; and see generally, New York Times, April-May 1971, for stories concerning the indiscriminate suffering and death in East Pakistan where vultures were reported as too fat to fly and bloated with blood.

Kassem.¹³⁹ There the military court considered the requirement that the guerrilla himself obey the laws of war was critical, even admitting for purposes of the decision the fulfillment of the requirement as to arms and uniforms.¹⁴⁰ The court stated that lawful belligerency "is incompatible with disregard of the rules and customs of war," and concluded that the accused be denied prisoner of war status because, "the Popular Front for the Liberation of Palestine acts in complete disregard of the international consuetudinary law accepted by civilized nations."¹⁴¹

In 1968 the confrontation between Indonesia and Malaysia produced two cases of interest concerning the denial of prisoner of war status and the refusal to consider one's own nationals or persons who engage in belligerent acts out of uniform as privileged belligerents.¹⁴² Practice seems to require more than membership in an insurgent organization and that the guerrillas follow certain minimum rules of conduct including the general requirement that guerrillas themselves follow the laws of war.¹⁴³ In Resolution XVIII of the 1969 Istanbul Conference¹⁴⁴ the International Committee of the Red Cross and the nations supporting that position went further than any prior normative precepts and declared that combatants "who participate in non-international armed conflicts and who conform to the provisions of Article 4" of the Geneva Prisoner of War Convention "should . . . receive treatment similar to that which that Convention

¹³⁹ INSTITUTE FOR LEGISLATIVE RESEARCH AND COMPARATIVE LAW, LAW AND COURTS IN THE ISRAEL-HELD AREAS, 17 (Hebrew Univ. of Jerusalem 1970); reviewed in 65 AM. J. I. L. 409 (1971). See also MERON, SOME LEGAL ASPECTS OF ARAB TERRORISTS' CLAIMS TO PRIVILEGED COMBATANCY (1970).

¹⁴⁰ The Israeli military court would apparently accept green outfits with caps as fulfilling the uniform requirement on the desert. For an example of the great difficulty Ceylon is having in this regard see, *Ceylon's Police and Army Fight Rebels with Terror*, New York Times, Apr. 25, 1971, at 2, stating, "The insurgents were seen wearing blue trousers and shorts during their initial raids . . . [t]o try to ferret them out, the police have taken to stopping young men and ordering them to take down their trousers to see if they are wearing blue shorts. . . ."

¹⁴¹ Israeli opinion, *supra* note 139 at 34. The opinion dismissed the problem of applying art. 4(A) (3) of the Geneva Prisoner of War Convention in a rather unsatisfactory manner at 24. Cf. III PICTET at 62-64; but the 1956 U.S. Army manual would apparently allow the same conclusion though it is not clear. See FM 27-10, paras 74, 80-81; but cf. para 70.

¹⁴² See Baxter, *The Privy Council on the Qualification of Belligerents*, 63 AM. J. I. L. 290 (1969). Again, there was a refusal by courts to consider the problem posed by the plain meanings of article 4(A) (3) and article 16 of the Geneva Prisoner of War Convention.

¹⁴³ See MERON, *supra* note 139 at 24-41. But note that Article 4(A) (3) of the Geneva Prisoner of War Convention does not mention any requirement other than membership.

¹⁴⁴ Resolution XVIII, *supra* note 82; the vote was 50/31/19.

lays down for prisoners-of-war." (Emphasis supplied.) The present author believes that the Resolution should be complied with and interpreted to allow prosecution of those who disobey the law of armed conflict themselves. This would afford some humane treatment to guerrillas who conduct their operations in accordance with the law of war and serve to induce guerrillas to respect those normative precepts (assuming that they would be so motivated by reciprocal treatment and that problems with guarantees of humane treatment could be worked out through such means as an inspecting and protecting power in conflicts not of an international character).¹⁴⁵ The only consistent experience on record of such action has been that instigated by the United States concerning the treatment of persons who have engaged in belligerent acts and were captured by American forces or brought under American classification procedures in the Vietnamese conflict.¹⁴⁶ Vietnam proves that the concept is workable if there is sufficient desire and manpower to support the effort.

Our next inquiry concerning guerrilla warfare involves the need for both sides of the conflict to avoid the use of terror and indiscriminate suffering. Mao-Tse-Tung has often been quoted as saying that revolutionary war can only be waged with the support of the masses and that the revolutionary fish cannot survive out of the sea of the general populace. Actually we can add that a neutral population can be just as useful to the guerrilla in continuing his struggle; and in most insurgencies, as perhaps with any political issue, often "a great part of the population has no concern about the struggle and is sympathetic to neither combatant."¹⁴⁷ Few seem to realize that insurgencies can and do develop without popular support and that apathy can be as beneficial to the insurgent as actual support.¹⁴⁸ In fact one

¹⁴⁵ See FAREY, *supra* note 15 at 39-43.

¹⁴⁶ See U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, *Military Intelligence Combined Screening of Detainees*, Annex A, paras 2-5 (MACV Dir. No. 381-46, Annex A, 1967), concerning classification and disposition of detainees; and U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, *Inspections and Investigations Prisoners of War—Determination of Eligibility* (MACV Dir. No. 20-5, 1968), concerning the classification procedures and the nature of the "Article 5" (of the Geneva Prisoner of War Convention) tribunal. Both of these Directives are reproduced in *Contemporary Practice of the United States Relating to International Law*, 62 AM. J.I.L. 745, 766-75 (1968). These directives are important concerning United States prosecutions of officers for failure to obey lawful general orders and for dereliction of duty.

¹⁴⁷ U.S. ARMY FIELD MANUAL No. 31-16, *Counter guerrilla Operations*, para 8(b) (1963). The passage continues, "Extreme care must be used in dealing with the civilian population in an effort to cultivate their support."

¹⁴⁸ Consider the example of the present insurgent movement in Ceylon where a popularly elected government has gained the support of both the

author who seems inescapably entranced with the myth of popular support has concluded without authority that the National Liberation Front (VC) enjoys the support of the South Vietnamese people, is a third world populist movement and that the reason why the United States has had a "failure to work its will in Vietnam" concerns the "potential strength of popular resistance."¹⁴⁹ In view of the many (though admittedly imperfect) elections in the south, and we hear of none in the north, and the recent State Department disclosure that approximately ninety per cent of the North Vietnamese prisoners of war do not want to return to the communist north,¹⁵⁰ the author's conclusion is highly questionable. In fact, violence has many times been advocated only by political failures. Violence as a political right of political failures is incompatible with any objective concept of democracy or self-determination. It cannot help the political failure in this regard to justify action on the basis of an opinion that the government can be toppled by no other means than a resort to violence. The critical focus is *self-determination* of the "people."¹⁵¹

U. S. and USSR in fighting the "unpopular" rebels. See also WILLS, WHO KILLED KENYA?, 80 (1953); and KRAFT, THE STRUGGLE FOR ALGERIA, 108 (1961), stating that the Moslem population simply followed the lines of force and "[o]f the war, their only hope was that it would end soon. If they favored one side or another they kept it to themselves with a muteness that was striking."

¹⁴⁹ FARER, *supra* note 15 at 46-47. Tom Farer's view seems also to represent an oversimplification of the Vietnamese conflict and does not consider the nature of North Vietnamese involvement in the war since the early 1960's. We might turn his thoughts around to say that North Vietnam's failure to work its will in South Vietnam suggests the potential strength of popular resistance and that "[o]nce a substantial segment of the local population becomes actively hostile, imperial control becomes uneconomic"; but such would seem an oversimplification as well. For different viewpoints concerning the characterization of the conflict and the problems exemplified relative to conflict management see Vols. I, II, and III, THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk eds. 1968, 1969 and 1972).

¹⁵⁰ Speech by Mr. Sieverts, Special Assistant to the Under Secretary of State for Prisoner of War Matters, at the 65th Annual Meeting, American Society of International Law (Wash. D.C., Apr. 30, 1971).

¹⁵¹ See U.N. CHARTER art. 1, para 2, stating that the purpose of the United Nations is to develop "respect for the principle of equal rights and self-determination of peoples." The author is aware of the problem posed by a situation where the majoritarian domestic government is violating the expectations of the community of nations including principles of the U.N. Charter concerning equal rights and human dignity. But the question really concerns concepts relative to intervention and conflict management or domestic revolution. In all cases, no matter what the political motive for action, the normative precepts relative to the law of armed conflict must be followed. Indiscriminate suffering is not justified on the basis that the revolution or intervention is proper, since recourse to violence questions are and should be separate from questions concerning the proper extent or application of vio-

As Abraham Lincoln said in his Inaugural Address, if the government fails to represent the interests of the people, the people have a revolutionary right to overthrow the government. But the threshold question is answered with the identification of the wishes of the people, not in the aspirations of minority interests who would impose their will on others by force and violence. This does not mean that self-determination is always identifiable with the status quo government, but it is also not always simplistically coexistent with the insurgent group. Though difficult to identify, this principle of self-determination should guide our foreign policy as well—any government without the support of its people should not receive United States support or assistance. In fact, we should be a leader in affirmatively seeking to establish self-determination rather than taking a status quo approach to the “communist” problem which can lead to the frustration of peoples who are guilty only of possessing the same aspirations that we cherish as “American” and are found in our Constitution. Legitimate frustration can lead to or even require revolutions not always compatible with United States “interests,” thus pointing to the failure in the long run of the status quo policy. Consider a statement concerning the counterinsurgency doctrine of President John F. Kennedy. He stated that in order to deprive the guerrilla of his essential popular base, counterinsurgency requires physical security for the rural population “coupled with a superior program of economic assistance and social reform.”¹⁵² In many cases someone seems to have forgotten the “superior” program of economic assistance and social reform which, of course, may not be as privately profitable as giving away tax purchased trucks and bombs or allowing blackmarkets and corruption to spread. Someday we must find room for corruption and greed in publicly beneficial programs—chivalry, christianity and humanity seem to have failed.

lence during armed conflict. See McDUGAL, at 528-29. The present author disagrees with an overbroad assertion that legitimate political objectives “should be incorporated into the principle of military necessity” (emphasis added), and reiterates the “fundamental preference” for the principle of humanity reflected in the expression “that the general principle of military necessity is circumscribed by the more specific prescriptions of the rules of warfare.” See McDUGAL, at 528, 529 n.18; and Falk cited at TAYLOR at 137. See also *United States v. List*, 11 Trials of the War Criminals 757, 1255-256 (1948), stating, “We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law. . . . The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise. . . .”

¹⁵² FARER, *supra* note 15 at 25.

Furthermore, the human problem created by the denial of a proper and consistent refugee program during counterinsurgency efforts is greatly compounded if a great number of the persons evacuated from their homes decide, even after repeated warning, to trickle back to what they consider a "better life." After deprivation and the denial of basic human needs in certain refugee camps, it would not seem unusual for a refugee to conclude that he should go back to the home of his ancestors to raise food and provide for his family—after all war is a traditional experience for the Vietnamese and they have survived before in the midst of battle. The tragedy, however, concerns the fact that a refugee might not be able to fully contemplate the effects of 20th Century technology or realize the legal and military ramifications which follow upon the reclassification of his home as an area which contains no innocent civilians. If the exodus from improper refugee facilities is the cause of death for even half of the hundreds of thousands of civilians killed in Vietnam, it would seem to demonstrate not so much a criminal act of murder but at the very least a key failure in United States foreign policy.¹⁶² It would also reveal, as this war enters perhaps its seventeenth year for the United States military advisor, how critical the civil relief program is to the military commander and his mission.

Another misconception connected with the battles of insurgency and counterinsurgency concerns an effort at justification put forward on the basis of unilateral opinion as to the nature of "innocence." The idea is that anyone who does not readily identify himself with one side of the conflict is not "innocent" and for this political apathy or perhaps the will to live he can be subject to terror, indiscriminate suffering and murder. Other attempts are sometimes made to blur neutrality or indifference

¹⁶² However, the commander cannot abdicate responsibility and to the extent that loss of innocent lives becomes *predictable* due to poor warning procedures, improper evacuation, known resettlement by a third of the refugees, known use of prohibited areas for fishing or crop raising, etc., then criminal responsibility begins to come into focus. Numerous persons have stated that not all of the refugees remain in the refugee camps or not all of the villagers go to the camps in the first place. See, e.g., *CRIMES OF WAR*, *supra* note 8 at 306, 312. Furthermore, it has been stated that many refugees live in an anarchistic and dependent "hustler" society or, finding such a life intolerable, go back to their village. To the extent that improper refugee program administration has resulted in deaths in the villages or camps and has resulted in the creation of an undesirable social environment we can see the extent of failure in the overall program and the U.S. mission in Vietnam. This failure seems to have also contributed to a dehumanizing of the Vietnamese in the eyes of some soldiers which if coupled with fear and frustration can lead to war atrocities.

by calling the people active enemy sympathizers as if even political sympathy or supportive roles would allow indiscriminate suffering, torture and murder by both sides. This, in the opinion of some, is precisely the mental state which played an important part in the massacres at Hue and My Lai in 1968 and Duc Duc in 1971.¹⁴⁴ It is not only a myth but an absurdity which should be recognized as unsupportable in law and community expectation whether it is asserted domestically or on the international level.

Actually, the insurgent and the government fighting him would do much better in not antagonizing the apathetic or neutral segment. Overreaction or indiscriminate attack was recognized as an evil by Mao Tse-Tung, and wise governments who know the danger of wrong action can attest that such may not only add to the survival of the guerrilla-insurgent but also become disastrous in forcing the neutrals over to his side.¹⁴⁵ Here lies a mutual self-interest basis for agreement concerning implementation of normative precepts and the lawyer should actively seek to point out this basis for mutual concern and conduct. If guerrilla warfare is political, then it is critical to act in a political way, and one of the best ways of defeating yourself is through indiscriminate terror attacks or massacres. Furthermore, such measures are now being more clearly delineated as violations of the law of war and are likely to spark adverse international reaction.

In 1969 the United Nations General Assembly adopted a resolution which generally condemns indiscriminate warfare, prohibits attacks upon the civilian population as such, and requires that a distinction be made between those taking part in hostilities and those who are not.¹⁴⁶ The United Nations actually adopted

¹⁴⁴ See generally, *CRIMES OF WAR*, *supra* note 8 at 419-44 and 459-68; and HERMAN, *supra* note 108 at 32-38 and 47-48.

¹⁴⁵ It has been stated that the Viet Cong have counted on a U. S. overreaction to military situations in their efforts to antagonize neutral civilians. A planned tactic was to incite overreaction by the use of sniper fire in a village area in the hope that the U. S. troops would respond with less discriminate firepower (referred to as the "mad minute" in which a unit opens up with all available firepower). See HERMAN, *supra* note 108 at 35, 63. Note that a response which is not proportionate can involve criminal acts.

¹⁴⁶ G.A. Res. 2444, 23 U.N. GAOR, Supp. 18, at 50, U.N. Doc. A/7218 (1969). Attacks on the civilian population "as such" (or attacks directed solely toward noncombatants) are also prohibited by customary international law. See FM 27-10, para 25, which states that it is "a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them"; and the 1868 St. Petersburg Declaration, III PHILLIMORE, *INTERNATIONAL LAW* 160-62 (3d ed. 1885), which declared that the only legitimate object which states should endeavor to

57 MILITARY LAW REVIEW

a resolution from the Vienna Conference of the International Committee of the Red Cross in 1965,¹⁰⁷ thus initiating a possibly greater working relationship between the two international organizations and demonstrating their unified concern in this matter. Of recent interest is a resolution from the Istanbul Conference in 1969 entitled the "Istanbul Declaration." It states that man has the right to enjoy lasting peace, to be able to live a full and satisfactory life founded on respect of his rights and of his fundamental liberty, that the universally recognized general principles of law demand that the rule of law be effectively guaranteed everywhere, and *"that it is a human right to be free from all fears, acts of violence and brutality, threats and anxieties likely to injure man in his person, his honour and his dignity."*¹⁰⁸

Of course, common article 3 of the 1949 Geneva Conventions forbids inhumane treatment, torture, violence to persons and

accomplish is to weaken the military forces of the enemy (i.e., not attack civilian noncombatants). This same principle of law was recognized in the 1863 Lieber Code, Article 15, which states that military necessity "admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war . . ." (emphasis added); which would mean that *unarmed* enemies may not be made the object of attack. Article 22 of the 1863 Code made this quite clear when it declared that "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." Article 44 punished all "wanton violence" against such persons "under penalty of death." See also HALLECK at 190-91; and WINTHROP at 778. Given the rule against attacks directed solely toward the civilian noncombatant population, the rule requiring that a distinction be made at all times between combatants and noncombatants can be implied as a necessary corollary (since one must distinguish between the two in order to know who it is that must not be attacked). These rules are not only relevant to acts of assassination but also to terror attacks on populations, morale bombings (since noncombatant civilians as such cannot properly be classified as a legitimate "military target" under these rules), or attacks on noncombatants merely because they are enemy sympathizers or active enemy supporters in a noncombatant role.

¹⁰⁷ XXth International Conference of the Red Cross, Resolution XXVIII (Vienna, 1965), reprinted at 75 INTERNATIONAL REVIEW OF THE RED CROSS 305 (1967). The United Nations did not adopt a provision concerning the use of nuclear weapons.

¹⁰⁸ XXIst International Conference of the Red Cross, Resolution XIX (Istanbul, 1969) (the Istanbul Declaration) (emphasis added), reprinted at 104 INTERNATIONAL REVIEW OF THE RED CROSS 620-621 (1969). See also J. PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 51-52 (1966); and Final Act of the International Conference on Human Rights Resolution XXIII (Teheran, April-May 1968) adopted by the UNESCO-convened Conference with one abstention and no votes against it. The resolution referred to widespread violence including, "massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare including napalm bombing."

murder of persons taking no active part in the hostilities in an armed conflict not of an international character. But the United Nations and the two Red Cross Conferences seem an extra global effort to make clear the prohibition of terrorist attacks on the civilian population, massacres and measures of indiscriminate warfare. It is of no small consequence in these matters that the community has forbidden persons to engage in hostilities without a uniform or while not identifiable from the rest of the population, for in a very real sense the frustration which sometimes leads to unwarranted injury and death is also attributable to the tactics of the guerrilla, and the human right to be free from all fears, acts of violence and brutality, threats and indiscriminate suffering is imperiled by an inability to identify the guerrilla-insurgent who will not wear an identifiable insignia or uniform while engaged in hostilities.¹⁵⁹

Furthermore, it should be noted that the principles of human rights enunciated in the 1948 Universal Declaration of Human Rights include the right to life and the security of person (Article 3); the right to be free from torture or cruel, inhuman or

¹⁵⁹ Much of this line of reasoning has contributed to recent denials of POW status to guerrilla-insurgents in the Mid East conflict, see The Military Prosecutor v. Omar Mahmud Kassem, INSTITUTE FOR LEGISLATIVE RESEARCH AND COMPARATIVE LAW, *Law and Courts in the Israel-Held Areas*, 17 (Hebrew Univ. of Jerusalem 1970), reviewed in 65 AM. J.I.L. 409 (1971); and MERON, SOME LEGAL ASPECTS OF ARAB TERRORISTS' CLAIMS TO PRIVILEGED COMBATANCY (1970). Similarly, persons were denied POW status in the conflict between Indonesians and Malaysians in 1968, see Baxter, *The Privy Council on the Qualification of Belligerents*, 63 AM. J.I.L. 290 (1969). But in other conflicts POW status or something similar has been granted to persons who have themselves followed the laws of war in a general sense; see activities of the British during the Kenya uprising of the Mau Mau, and the French during the Algerian conflict in FAREE, *supra* note 15 at 39. For U.S. policy in Vietnam see U.S. MILITARY ASSISTANCE COMMAND, VIETNAM, *Military Intelligence Combined Screening of Detainees*, Annex A, paras 2-5 (MACV Dir. No. 381-46, Annex A, 1967), reproduced with others in *Contemporary Practice of the United States Relating to International Law*, 62 AM. J.I.L. 754, 766-75 (1968).

For problems connected with the classification of guerrillas as POWs and the U.S. practice in Vietnam, see Bond, *Protection of Non-Combatants in Guerrilla Wars*, 12 WILLIAM & MARY L. REV. 787, 796-803 (1971). Of course, the present author disagrees with Professor Bond's conclusion, *id.* at 797, that present POW classification requirements (such as those of Article 4(A) (2) of the 1949 Geneva Prisoner of War Convention) which include the need for guerrillas to: (1) follow the applicable laws and customs of war, (2) carry arms openly, and (3) wear an insignia or uniform during actual hostilities which recognizably distinguishes them from the general populace at a distance, do not contain an "absurdity" nor are they filled with "irrelevance" to guerrilla conflict needs or to legal principles and policy (including the corresponding human rights interests of the local population). See MERON, *supra*, for an apt analysis of the policies involved.

degrading treatment or punishment (Article 5); and certain other related rights against arbitrary deprivation of freedoms (Articles 9 and 12).¹⁰⁰ No exception is made to those principles because of the existence of war or the tactics of guerrillas in any armed conflict.

Similar provisions of treaty law exist in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰¹ in Articles 2 and 3. Although Article 15(1) of the Convention allows derogations from the provisions to occur in time of war or other public emergency "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law" (such as Article 3 of the 1949 Geneva Conventions in cases of an armed conflict not of an international character, and the large body of the rest of the law of war concerning international conflicts, "belligerencies" and "war"), it is expressly provided in Article 15(2) that no derogation from Article 2 shall be allowed "except in respect of deaths resulting from lawful acts of war" (emphasis added) and no derogation from Article 3 (which prohibits torture and inhumane or degrading treatment or punishment) under any circumstances.¹⁰²

The same general principles and rules as to derogations from the rights to life and freedom from torture and degrading or inhumane treatment can be found in the 1969 American Convention on Human Rights, Articles 4, 5, 8, 25 and 27 (the last three articles dealing with fair trial, judicial protections, and the rule that no suspension of Articles 4 or 5 can occur);¹⁰³ and the 1966 Covenant on Civil and Political Rights, Articles 6, 7, and 4(1) and (2) (the last article expressing the rule that there

¹⁰⁰ G.A. Res. 217, 3 GAOR, U.N. Doc. A/810, at 71 (1948). A 1968 meeting of private experts at Montreal, Canada, issued the "Montreal Statement" which called the 1948 Declaration an authoritative interpretation of the U.N. Charter of the highest order and of customary international law. See J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS 13-14 (1970). For an historic background of the prohibition against torture, see Coursier, *The Prohibition of Torture*, reprinted in 126 INT'L REV. OF THE RED CROSS 475 (1971).

¹⁰¹ 213 U.N.T.S. 221 (1950).

¹⁰² For a recent "applicable" situation, see *Ulatz: "Ill-Treatment," Not "Torture,"* Wash. Post, Nov. 17, 1971, at A21. The present author fails to see the legal relevance of the distinction when a comparison of the conduct prohibited by both Article 3 of the 1949 Geneva Conventions and Article 3 of the 1950 European Convention on Human Rights is made—each prohibits ill-treatment in the broadest sense ("inhumane" treatment, "cruel", "degrading," "humiliating" treatment, and "violence").

¹⁰³ Reproduced at 65 AM. J.I.L. 679-702 (1971) (not yet ratified).

can be no derogation from the protections of Articles 6 and 7).¹⁶⁴

Not only has the community begun to focus on the human rights involved with the use of indiscriminate measures of armed conflict or torture and inhumane, cruel or degrading treatment; but, as we have seen, the basis for community condemnation can be found in customary precepts such as those expressed in the 1865 opinion to the President which condemned indiscriminate attacks and similar guerrilla tactics as an aggravation of the horrors of war and conduct for which the perpetrators must be in some manner accountable.¹⁶⁵ In conclusion, there is a great deal of wisdom in a statement made at the 1969 Conference on Contemporary Problems of the Law of Armed Conflict:

... [I]t is necessary to remember the essence of the laws and customs of war is not to confer legality upon violence and destruction, but to limit violent activities, in whatever way possible, in order to conserve certain humanitarian and civilizing values. . . . [T]errorism runs counter to the principle of the distinction between lawful and unlawful objectives. . . . International law cannot, without completely undermining itself, confer privileged status on acts which so clearly run counter to it, whatever motives inspire those who commit them. Here, as elsewhere, the principle that the end justifies the means would signify the end of any limitive regulation.¹⁶⁶

The last phrases of this perceptive statement help to reiterate the principle that there can be no legal acceptance of political excuses for the denial of community expectations and obligations.

C. ASSASSINATION

It is generally understood that assassination of an enemy is strictly prohibited by the law of war no matter what the motive

¹⁶⁴ Adopted by G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, at 52-58, U.N. Doc. A/6316 (1966) (vote: 106-0-0) (not yet ratified).

¹⁶⁵ 11 OPS. ATT. GEN. 297 (1865); see also, GREENSPAN, THE MODERN LAW OF LAND WARFARE 55 (1959); and SCHWARZENBERGER, INTERNATIONAL LAW 112, 116-17 (2d ed. 1949).

¹⁶⁶ *Supra* note 113 at 39, 42. The words are those of Denise Bindschedler-Robert, and are reprinted at MERON, *supra* note 139 at 25-26. See also MERON, at 26, quoting Dr. Henri Meyrowitz as stating, "the prohibition of terrorist bombings is considered by the majority of authors as an imperative principle of the law of war." Cf. Conference on Contemporary Problems of the Law of Armed Conflicts, *supra* note 113 at 78, indicating a minority viewpoint that discriminate attacks on civilians may be proper. The minority view is expressed by Tom Farer, *supra* note 15 at 42-43.

or military benefit.¹⁶⁷ Assassination generally encompasses the killing of a selected individual or group in a treacherous manner,¹⁶⁸ though attacks on individual soldiers or officers by uniformed troops in combat is not prohibited unless the death would constitute unnecessary suffering under the circumstances (as where it would be relatively easy to capture the person instead of killing him). For many of the same reasons it is prohibited to offer rewards or inducements for the killing of the enemy in such a manner that death becomes the desired policy and not capture as required by law.¹⁶⁹ There is ample evidence of community condemnation of premeditated murder in cases involving the Gestapo assassinations or the mass civilian exterminations in World War II. For example, Kurt Mayer, the commander of a German unit, was convicted for having incited and counseled his troops to deny quarter to allied troops.¹⁷⁰ Additionally, the *List* case made an authoritative declaration that the intentional killing of captured persons without trial would be nothing less than murder.¹⁷¹

Winthrop had earlier expressed this customary rule and stated that except where unavoidable, in the course of legitimate operations, private individuals and noncombatants were not to be involved in injury to life, person, or property. Many examples of prosecution are cited.¹⁷² Winthrop also stated that customary law forbids "the employment of assassins, or other violent or harmful and secret method(s) which cannot be guarded against by ordinary vigilance. . . ." ¹⁷³ The 1863 Lieber Code had earlier prohibited the unnecessary or revengeful destruction of life in general,¹⁷⁴ and specifically stated that the law of war does not allow the proclaiming of any person as an outlaw to be killed without trial and that "[c]ivilized nations look with horror upon the offers of rewards for the assassination of enemies as relapses into barbarism." ¹⁷⁵

¹⁶⁷ See H.C. IV, Annex, Article 23(b), (c), (d), and (e); and FM 27-10, para 31 (1956). See also III BRITISH MANUAL OF MILITARY LAW, para 115 at 42 (1958); and II OPPENHEIM at 341, 430, 567 n.2. Certainly relevant are the 1949 Geneva Conventions which prohibit the killing of protected persons.

¹⁶⁸ FM 27-10, para 31 (1956), states, however, that it does not "preclude attacks on individual soldiers or officers of the enemy. . . ."

¹⁶⁹ See II OPPENHEIM at 341, 567 n.2.

¹⁷⁰ Trial of Kurt Mayer (The Abbaye Ardenne Case), 4 L.R.T.W.C. 97 (1948). He was also found responsible for the shooting of prisoners of war at his headquarters though he was not found to have ordered the killings.

¹⁷¹ United States v. List, 11 Trials of the War Criminals 757, 1250 (1948).

¹⁷² WINTHROP at 778.

¹⁷³ *Id.* at 785.

¹⁷⁴ Article 68.

¹⁷⁵ Article 148.

Focusing on the Vietnamese conflict a recent newspaper article provides a relevant fact situation which, if true, could demand investigation and prosecution in connection with the rules prohibiting the incitement, inducement or actual command policy of a refusal of quarter to enemy combatants. It was reported that one battalion issued "Kill Cong" badges for recognition and combat spirit purposes.¹⁷⁶ Such purported conduct or related allegations of the use of ears cut from dead enemy personnel as evidence of the kill or individual valor could lead to a troop attitude that the enemy is to be killed in all circumstances, even after surrender or capture. A commander who became aware of such an attitude and took no steps to prevent the commission of war crimes could find himself subject to prosecution.

A much more serious allegation concerned the infamous Green Beret "case" and the now publicized Phoenix program. If ever there was an assassination of a captured person in the Vietnamese conflict carried out by our troops, such conduct would be nothing less than murder and a war crime. It has been stated that the Phoenix program for the "neutralization" of the VC underground is "entirely a South Vietnamese program," but it was originated by the CIA, is paid for by the Defense Department, the CIA and AID (Agency for International Development), and is directly supported by U.S. troops and a few civilians.¹⁷⁷ The fact that actual assassination was performed by an ally would not absolve U.S. troops, commanders, or government officials of criminal responsibility if the facts prove conspiracy or complicity. A program involving predictable though "undesired" killings by allied troops or police could involve American criminal responsibility up to the highest levels especially where evidence of allied abuse becomes apparent over a period of time but the program and direct support continues as an American operational effort. If assassinations do occur they not only raise legal questions concerning personal guilt, but also create serious havoc with the principle of "self-determination" and the other general justifications made for U.S. involvement in Vietnam. Perhaps more agonizing is the likelihood that of all the possible war crimes committed in Vietnam, assassination is more acceptable to an American public perhaps partially conditioned by mafia assassination and the murders of political leaders and even

¹⁷⁶ Baltimore Sun, Jun. 11, 1970.

¹⁷⁷ *U.S. Aide Defends Pacification Program in Vietnam Despite Killings of Civilians*, New York Times, Jul. 20, 1971, at 2, col. 4. Mr. Colby said that the Phoenix program was not an assassination program. *Contra* CRIMES OF WAR, *supra* note 8 at 295-96 (1971)

Presidents. Where does it end? Where indeed when law professors like Tom Farer seem to favor the eroding of a distinction between combatants and civilians under a notion of an expanded "legitimacy" of civilian targets.¹⁷⁸ Professor Farer apparently feels that civilian "participants" in either side's administrative or political structure are proper targets for terrorist attacks and assassination. The pamphlet of a recent meeting records Professor Farer as the propounder of a view which could lead to the destruction of the distinction between combatants and civilian non-belligerents—a view that in "many civil wars, the whole issue is which administrative structure, including the police and army, shall govern. . . . People who occupy administrative positions assume a common risk in time of civil war whether they wear a three-piece suit or a uniform."¹⁷⁹

D. MYTHS AND NORMS CONCERNING BOMBING PRACTICE

The United States has been accused of ignoring the laws of war in the bombings of North and South Vietnam, engaging in unrestricted air and artillery bombing of hamlets, spreading unrestricted bombing into Laos and Cambodia, and engaging in a policy of devastation.¹⁸⁰ Further criticism centers on the use of massive fire power instead of greater numbers of troops; with the motivation for such a policy labeled as an act of "political convenience."¹⁸¹

It should first be made clear that the injury, death and dislocation which result from the use of massive fire power¹⁸² is regrettable to all, morally repugnant to many, and in connection

¹⁷⁸ Statement of Tom Farer, *The Law of Armed Conflict*, *supra* note 113 at 78-79.

¹⁷⁹ *Id.* For recent practices see Wash. Post, May 11, at 17, and June 4, at 10, 1972.

¹⁸⁰ See, e.g., Sheehnan, *Should We Have War Crimes Trials?*, New York Times, Book Review, Mar. 18, 1971, sec. 1 at 1 [hereinafter cited as Sheehan]. Cf. *Pentagon Defends Air War*, Washington Star, Apr. 25, 1971, at 4.

¹⁸¹ Sheehan, at 30, quoting Robert McNamara, "We're going to trade fire power for men"; and see *U.S. Jungle-Clearing Bombs Now Turned On Troops*, New York Times, Apr. 15, 1971, at 5, pointing to the use of massive and deadly fire power in seven and one-half ton bombs, B-52 loads of 30 tons and anti-personnel "cluster-bomb units."

See HERMAN, *supra* note 108 at 55-57, concerning the tonnage of air and ground ordnance used in the Vietnamese conflict—twice as much as utilized by U.S. forces in both theaters of World War II or 70 tons of air ordnance for every square mile of North and South Vietnam.

¹⁸² Some 150,000 civilians killed and 350,000 wounded since 1965, Sheehan, at 2. Cf. *7.5 Million Civilians Listed as War Victims*, Philadelphia Inquirer, Apr. 25, 1971, at 2, stating that civilian deaths are estimated at 325,000 and casualties at 725,000 in South Vietnam.

with legitimate counter-guerrilla policy, reprehensible whenever there does not exist coextensive economic and social assistance.¹⁸³ Furthermore, it must be made clear that the refugee problems in Southeast Asia deserve the full attention of our government and the human community. But our focus here is not on the moral issues and political battles connected with those events but with accusations of criminal responsibility. Of great importance in our inquiry is an awareness of the problems created with any criminal accusation unsupportable in fact and law. Some have attempted to characterize United States counter-guerrilla efforts as "genocide" (ignoring the guerrilla contributions); but as even the critics of bombing policy point out, "[t]he story is more complicated and the facts do not support the charge."¹⁸⁴ Furthermore, we are warned, such unfounded accusation is "capable of perversion into a new McCarthyism" or "a public witch-hunt"¹⁸⁵ as uncivilized as any trial in man's history which is motivated by group hatred, fear and insecurity.

Perhaps with this in mind Telford Taylor has correctly stated that whether the decision to bomb in North Vietnam was militarily unsound or morally wrong are not legal issues.¹⁸⁶ Today we are faced with a painful question—what laws do we have for aerial bombardment?¹⁸⁷ Telford Taylor states that there is "little doubt that air strikes are routinely directed against hamlets and even single habitations";¹⁸⁸ and that although "these tactics are a response to the nature of guerrilla warfare . . . it is clear that such reprisal attacks are a flagrant violation of the Geneva Convention on Civilian Protection, which prohibits 'collective penalties' and 'reprisals against protected persons,' and equally in violation of the Rules of Land Warfare."¹⁸⁹

¹⁸³ See TAYLOR at 189-95, apparently feeling that it is then more than reprehensible and is at least a military failure as well. For related problems of law see text, *infra* note 217.

¹⁸⁴ See Sheehnan, at 32. See also O'Brien, *The Nuremberg Principles*, III THE VIETNAM WAR AND INT'L LAW 193, 199 (1972).

¹⁸⁵ *Id.*

¹⁸⁶ TAYLOR at 140.

¹⁸⁷ See *id.*, stating, "by the time the war [World War II] ended there was not much law left"; and an excellent work, DeSaussure, *The Laws of Air Warfare: Are There Any?* 23 NAVAL WAR COLLEGE REV. 35 (1971), stating, "At the present time there is virtually a complete lack of codified international law concerning rules of aerial warfare"; but recognizing the existence of minimum normative precepts. The same theme is repeated in an article of the same title and author in 5 THE INTERNATIONAL LAWYER 527 (1971).

¹⁸⁸ TAYLOR at 144, giving no precise examples.

¹⁸⁹ *Id.* at 144-45. This claim is also made by Sheehan, at 30, and FARER, *supra* note 15 at 27. The term "reprisal" is a conclusion not supported in Telford Taylor's work and one which does not take into consideration the fact that bombing enemy troops is not illegal.

The problem is that the 1949 Geneva Conventions are arguably not applicable to aerial and artillery bombardment, because "persons protected" under article 4 of the Geneva Civilian Convention (which is the critical focus for application of any of the protections found in Part III of the Convention) are only those who are "in the hands of" or control of a party to the conflict.¹⁹⁰ Persons in the battle area are not protected by the Conventions under the leading view and are only protected insofar as the Hague Convention No. IV and customary law in general prohibit certain conduct. How far customary law on air and artillery bombardment protected civilians up through the Second World War is revealing and regrettable. Today we are probably in the same dilemma as that which the court faced in *United States v. von Leeb*, when confronted with a decision as to whether an order to use artillery on civilian noncombatants to prevent their fleeing from a besieged area was an unlawful order. The court stated:

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back so as to hasten the surrender. We might wish the law were otherwise but we must administer it as we find it. Consequently, we hold no criminality attached to this charge.¹⁹¹

All is not fair in aerial warfare, but when the inquiry concerns criminal responsibility, it is critically important to focus on the state of the law of war as it now exists and not as we would

¹⁹⁰ See IV PICTET, at 47, stating that the phrase "in the hands of" is used in an extremely general sense and that "control" is sufficient as where a person is in territory under the control of an occupying power; but nowhere going further to require responsibility in the "no man's land" of the battlefield unless persons come under the actual control of a belligerent. Note that the protections of article 3 and Part II are wider in application but it has never been clear that they were intended to apply to aerial war; in fact PICTET, at 208-09, in referring to Article 28 of the Geneva Civilian Convention demonstrates that bombardments of areas containing protected persons is lawful assuming that the general rules of air warfare such as precision fire and engagement of military targets are followed. Note, however, that customary law prohibits attacks on the civilian noncombatants "as such," *supra* note 156.

¹⁹¹ *United States v. von Leeb*, 10 Trials of the War Criminals [hereinafter cited as T.W.C.] 1, 11 T.W.C. 563 (1948) ("The High Command Case"). See also FM 27-10, para 44(a).

hope it to be. It will not suffice to merely quote figures on refugees and war casualties. Each allegation must be tied to a specific legal norm and then be based on fact.

Mr. Sheehnan has probably identified the legal precepts most accepted today when he concludes that United States bombing in North Vietnam was generally carried out in a legal manner. He states that "conscious effort was made to bomb only military targets . . . and to weigh probable civilian casualties against the military advantages to be gained from a particular air-strike."¹⁹² Telford Taylor also concludes, "I can see no sufficient basis for war crimes charges based on the bombing of North Vietnam."¹⁹³ Such conscious efforts and the use of precision bombing tactics designed to keep the amount of suffering and destruction at a minimum while accomplishing the military objective is generally acceptable today. They most likely conform to humanitarian efforts against the indiscriminate use of firepower and attacks on the civilian population since precision bombing is discriminate.¹⁹⁴ As Telford Taylor points out the injury and death which result from unintentional overkill during precision bombing is not a punishable act but a necessary evil of war.¹⁹⁵ The legal focus concerns such words as "unintentional" and "precision," and the greatest difficulty concerning air practice in Vietnam is involved with the term "area bombardment."

If, as Telford Taylor seems to assert, there were ever intentional air strikes against hamlets with the intent only to kill noncombatants or to take no readily available precautionary measures to be discriminate and limit suffering,¹⁹⁶ then a violation of developed normative precepts would be quite possible. This is so despite the strategic arguments concerning World War II bombing practice at Dresden, Tokyo, Hiroshima and Nagasaki. But we are lacking facts proving that such intentional conduct has occurred. Mr. Sheehnan states that he saw ruins of hamlets that were bombed while civilians were there but seems content to conclude that civilian deaths were the result of unrestricted

¹⁹² Sheehnan, at 3. On the probable standards of law, see DeSaussure, *supra* note 187 at 41.

¹⁹³ TAYLOR at 142.

¹⁹⁴ See *supra* notes 156 to 158, and see generally DeSaussure, *supra* note 187. Today some commanders have available even more precise "smart bombs."

¹⁹⁵ TAYLOR at 141. Furthermore, such is not a reprisal action against civilians nor the imposition of a collective penalty, see *supra* note 189. See also Article 28, Geneva Civilian Convention, stating that the "presence of a protected person may not be used to render certain points or areas immune from military operations."

¹⁹⁶ TAYLOR at 144.

or indiscriminate bombing and a "devastation" policy¹⁹⁷ rather than trying to identify the military nature of the operation, the nature of the targets involved, whether the area had been cleared before of "friendly" villagers, and whether enemy civilians had later moved in along with a legitimate military target—the guerrilla. It should be remembered that the presence of civilians in close proximity to a military target does not render an area immune from aerial attack,¹⁹⁸ and unintentional suffering resultant from the proportionate engagement of that target is not a violation of the law of war.¹⁹⁹ Furthermore, it should be recalled that the war in Southeast Asia is not based on a policy of killing civilians but a policy to take measures required to keep noncombatants from harm while engaging the enemy in a lawful manner.²⁰⁰

A recent example of a legal attack on enemy troops which involved the death of innocent civilians in the battle area occurred in the central highlands south of Pleiku. North Vietnamese units "got into the Montagnard villages, and were firing at helicopters." Efforts were made to warn the civilians and allow them to leave "but the North Vietnamese did not let the villagers out."²⁰¹ The enemy troops were bombed and civilian casualties resulted presumably after weighing military necessity.

The only probable violation of the law of war here would concern the refusal by North Vietnamese units to allow an evacuation of the villagers to take place—an illegal guerrilla tactic which demonstrates a lack of concern for the law, a lack of concern for the need to weigh militarily necessary measures against destruction and suffering, and an intentional use of prohibited conduct in warfare which demonstrates an intent to place civilians directly in the midst of hostile fire.²⁰² This ex-

¹⁹⁷ Sheehnan, at 2.

¹⁹⁸ TAYLOR at 141. See *supra* note 195.

¹⁹⁹ See FM 27-10, paras 40-42; and DeSaussure, *supra* note 189 at 40-41.

²⁰⁰ See *Vietnam Orders: Spare Civilians*, New York Times, Apr. 26, 1971, at 25 (letter from Major General John H. Cushman); *S.L.A. Marshall: On the Nature of War*, New York Times, Apr. 30, 1971; and *Pentagon Defends Air War*, *supra* note 180.

²⁰¹ *The Idea Is Not To Kill Civilians—If Possible*, New York Times, Apr. 18, 1971.

²⁰² Note that this situation is far different from the one mentioned in *United States v. von Leeb*, 10 T.W.C. 1, 11 T.W.C. 563 (1948), relative to the North Vietnamese, since the civilians in the village were in the control of the North Vietnamese units and were exposed to grave danger in disregard of the 1949 Geneva Civilian Convention norms which were applicable because of the ground control of civilians. It also demonstrates a need which lawyers do not always realize for the use of a humanitarian gas in guerrilla warfare

emphasizes the point that in guerrilla warfare what is an "intended" or an "unintended" result can depend on varied circumstances and that conclusions as to responsibility should not be made without a consideration of the guerrilla activity. As Telford Taylor points out and some forget, what is militarily necessary is "a matter of infinite circumstantial variation."²⁰³ We cannot make rash, conclusionary statements concerning criminal responsibility but must determine each fact and rule relevant to the circumstance; it is not that violations of the law have not occurred but that loose allegations and conclusions do not prove violations of the law.

A further example of the need for precise analysis concerns the claims of illegality in the bombing of "hospitals."²⁰⁴ Article 27 of the Hague Convention²⁰⁵ allows exceptions to hospital immunity and states that "all necessary measures must be taken to spare, as far as possible . . . hospitals . . . provided they are not being used at the time for military purposes." "Hospitals" in Vietnam could be little more than a hole in the ground or tunnel complex²⁰⁶ which is also utilizable for military purposes. They may have no unique character necessitating a noncombatant enemy use. After evacuation of the medical supplies, the hole or tunnel complex could be destroyed by ground troops. If the same ground area is destroyed by air the unintentional destruction of medical supplies, which are not within the control of the aircraft commander for evacuation, would not seem to be a violation of the law of war. Of course, the intentional bombardment of "hospitals" known to contain only wounded, sick and medical personnel would not be allowable, nor would the intentional destruction of medical supplies.²⁰⁷

Finally we should consider the practice of area bombardment in connection with norm related conclusions such as "unrestricted," "indiscriminate," and "intentional." It is necessary to real-

and an effort to develop a humane gas as massive as the efforts to develop indiscriminately destructive germ or multi-tonnage bombs.

²⁰³ TAYLOR at 35.

²⁰⁴ See Sheehan at 2.

²⁰⁵ H.C. IV, Annex, Art. 27.

²⁰⁶ See, e.g., *Pentagon Admits Hospitals Shelled*, Wash. Star, May 3, 1971, at 4, stating that "hospitals" have been destroyed due to the enemy refusal to mark them with distinctive insignia and our learning of the nature of the facility only "after the fact."

²⁰⁷ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug 1949, 6 U.S.T. 3114 (1955), T.I.A.S. No. 3362, 75 U.N.T.S. 31, articles 33 and 50. For an allegation concerning the intentional destruction of medicine by ground troops see HERMAN, *supra* note 108 at 65.

57 MILITARY LAW REVIEW

ize that area bombing is not practiced until efforts have been made to clear the area of innocent civilians.²⁰⁸ Once the civilian population has been evacuated or the area designated as a clear area by the South Vietnamese, then area saturation bombing has been used to penetrate the jungle canopy to destroy enemy combatants, their food supplies, fortifications, and means of storage, communication, transportation and general troop support.²⁰⁹ This bombing practice which is connected with civilian evacuation programs is "discriminate" and "restricted" in nature, though admittedly a cleared and specified sector can receive massive bombardment to knock out the military target. Any civilian casualties in the sector are "unintentional" though the area is saturated with bombs since noncombatants are not supposed to be in the area. However, if an aircraft or helicopter commander knows that a spotted person is only a noncombatant, absent a militarily necessary measure, the intentional killing of such person would be illegal and not at all justifiable on the basis of area classification. Area classification is relevant only to the reasonableness of a soldier's response absent knowledge of noncombatant status. The laws of war still apply within the area—especially for ground troops.²¹⁰

An interesting suggestion has been made that the United States could have avoided the practice of area bombardment if there was massive troop use to protect isolated villages from Viet Cong and North Vietnamese terror attacks and execution raids.²¹¹ It was further suggested that the lack of massive U.S. troop use resulted from an act of "political convenience,"²¹² perhaps pointing to an American impatience with complex problems or difficult solutions and a preference for the use of heavily destructive technology²¹³ rather than measures designed for area securement on a gradual basis. However regrettable that impa-

²⁰⁸ See Taylor at 145; *Pentagon Defends Air War*, *supra* note 180, concerning rules of engagement applicable to Laos.

²⁰⁹ See DeSaussure, *supra* note 187 at 39; and excerpts from 1967 news reports cited at FARER, *supra* note 15 at 29. It should be noted that "area" bombing can be "target" bombing when troops are known to be in a small sector but the actual location is unknown. Once cleared as a Specified Strike Zone (SSZ) the zone section can receive extensive fire.

²¹⁰ GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 466 n.219 (1959), citing cases.

²¹¹ Sheehnan at 30.

²¹² *Id.* Such a conclusion takes an oversimplified view of South Vietnam's role in the number of U.S. troops to be stationed on her soil.

²¹³ Some even preferred a questionable and frightening "solution" to the war in the nature of a nuclear attack on Hanoi. Such persons might "solve" all U.S. foreign problems the same way as evidenced by statements relative to the Pueblo incident and "the tweaking of our nose."

tience may be, it is difficult to tie it to any criminal responsibility. The laws of war do not require that a commander utilize the most perfect means of winning the war but only the most effective legal means available to him for completion of the military mission with the least amount of additional suffering and destruction. As Telford Taylor declares, what is militarily necessary is a matter of conclusion after making determinations involving infinite circumstantial variation. In concluding this area of concern, however, it should not for a moment be pretended that we do not desperately need better international norms and guidance for the aircraft commander and rules for the limitation of unintended but extensive destruction and injury such as recent proposals for the creation of designated safety zones with outside inspection and protection from guerrilla misuse.

E. MISCONCEPTIONS AND POPULATION EVACUATION

Some criticize the South Vietnamese evacuation policies as an intentional "something" which might be placed in the category of "cultural genocide" and further as a program of the government to "sacrifice its people in an effort to save itself."²¹⁴ Telford Taylor seems more aware of the relevant law or community legal expectations and states that it is doubtful whether Article 49 of the Geneva Civilian Convention even applies to United States activity in the Vietnamese conflict, but then questions the clarity of the article's meaning.²¹⁵ With all due respect, it is difficult for the present author to conclude that Telford Taylor's "analysis" is "hard to improve upon." Article 49 reads:

²¹⁴ See FARER, *supra* note 15 at 28 and 30. Of course this terminology by itself would be insufficient for prosecution under international law. Even if the results could entail criminal responsibility under legal standards, there is lacking in the cited work any reference to ultimate guerrilla responsibility for such death, injury and destruction and to the principle of military necessity. Note that a further example of conclusion without legal basis can be found in a book review of Taylor's work, Boudin, *War Crimes and Vietnam: The Note in Whose Eye?*, 84 HARV. L. REV. 1940, 1942 (1971), stating that it is difficult to challenge "or to avoid the conclusion that forced 'relocation' of rural populations . . . are, in all contexts, 'war crimes' and 'crimes against humanity.' They seem clearly violative of the applicable Nuremberg principles. . . ." One need only read the applicable law to realize that it is mere fabrication to simplistically state that all forced relocation or control measures are illegal. Boudin's statement lacks even the semblance of a legal truism.

²¹⁵ TAYLOR at 146. Note that at 191-95 he also questions the soundness of counter guerrilla policies which alienate the people. Cf. IV PICTET at 280,, stating that a duty to evacuate might exist.

57 MILITARY LAW REVIEW

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The protection Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

It should be clear that the total evacuation of a given area is allowed if (1) the security of the population, or (2) imperative military reasons so demand. Concerning Vietnam it can be argued that the need for fulfillment of the provisions under the Geneva Civilian Convention for the security and protection of the civilian population can itself demand and constitute a valid basis for the evacuation of the civilian population out of areas where the civilians could (1) get in the middle of hostile action and be injured or killed, or (2) be subject to guerrilla terrorist and execution tactics.²¹⁶ Another legal basis for evacuation can be based on military necessity and involve a different focus on

²¹⁶ See, e.g., U.N. Secretary General Report, *Respect for Human Rights in Armed Conflicts* at 15, 17, 25 U.N. GAOR, U.N. Doc. A/8052 (1970), stating that the most effective way of minimizing or eliminating the risk to civilians would be to ensure "that civilians do not remain in areas where the dangers" of warfare predominate. And see IV PICTET at 280, stating that where a populated area is "in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and . . . the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge" (emphasis added). These places of refuge or relocation must be suitable for a humane existence and the needs of the population must be provided for by the Occupying Power. See *id.* at 281 and Geneva Civilian Convention, articles 16, 27, 49, and 55-59.

the same activity in that evacuation can be necessary to destroy the guerrilla's base of support by moving the civilians out of an area. When military necessity, population security and protection coincide it seems incredible to argue that the action is illegal—in fact it may be an attempt to secure areas as safety zones in conformity with developing expectations. However, the author realizes that the conclusions of illegality are probably tied to the treatment of the population after relocation,²¹⁷ or to a question as to whether the area can be destroyed once the population leaves.²¹⁸

Contrary to what some may believe, the government of South Vietnam, and not the United States (to the extent that our troops are not directly involved), is legally responsible for the care and treatment of its nationals under evacuation programs since the United States does not occupy South Vietnam, is there by invitation and is not an occupying power.²¹⁹ The obligations legally apply only to an occupying power or at least it seems only to a transferring power with direct physical contact.²²⁰ The idea that homes may not be destroyed where military consideration necessitates is nowhere stated in international law. The only relevant obligation for even an occupying power under Article 49 of the Geneva Civilian Convention is to return people back to "their homes" as soon as "hostilities" in the area have ceased.²²¹ It seems that fulfillment of the last provision can exist where new and better homes are provided.

In connection with village relocation it should be noted that there have been extensive on-the-ground burnings of villages reported as well as the destruction of food, cooking ware and live-

²¹⁷ See TAYLOR at 147 and FARER, *supra* note 15 at 28. Note that TAYLOR at 199 states that the United States has spent some \$100 million on refugee relocation from 1966-1968 alone, but that the cost of air operations was probably twenty-five times that amount for the same period. It is clear that an *Occupying Power* has the duty to affirmatively protect, aid and provide for the needs of the refugees who are thus relocated. See IV PICTET at 281, and Geneva Civilian Convention, articles 16, 27, 49, 55-56, and 59; and H.C. IV, articles 43 and 46.

²¹⁸ See TAYLOR at 146.

²¹⁹ See II OPPENHEIM at 434-46; and FM 27-10, paras 351-55.

²²⁰ See Article 49, Geneva Civilian Convention; and IV PICTET at 280-81. Cf. Arts. 13 and 16 of the Geneva Civilian Convention. Note that international law does not preclude a unilateral moral inquiry and the development of positive assistance programs which directly benefit war refugees and victims.

²²¹ It has been reported that 90,729 people were returned to their homes in 1968 and that some 300,000 were returned in 1969. Mien, Vietnam: *National Security Needs In A Constitutional Government* (unpublished thesis at U.S. Army JAG School, 1971). See also O'Brien, *supra* note 184 at 229.

57 MILITARY LAW REVIEW

stock.²²³ But whether such conduct is criminal or not would depend upon whether there was an actual military necessity for the property destruction.²²⁴ Such a necessity could be argued where the particular village, food or other property was very likely to fall into enemy hands and it was imperative to deny such use to the enemy combatant in order to defeat him. Of course, the destruction of a village merely to help the ground commander in general military operations does not mean that such destruction is militarily necessary—nor would the destruction of a village be necessarily proper merely because the enemy could count on village sympathy since the destruction of property, if intentional, must be imperative.

F. RESPONSIBILITY FOR THE CONDUCT OF ALLIES

What we are concerned with is United States' responsibility for allied treatment of allied nationals. Under present international law there seems a paucity of such responsibility. No mention of responsibility for the conduct of allies seems to exist ex-

²²³ See, e.g., *13 Villages Near Songmy Reported Razed in a Week*, New York Times, Nov. 26, 1969; and HERMAN, *supra* note 108 at 84-86.

²²⁴ See FM 27-10, paras 56-59 (1956). These same rules of war are applicable to crop destruction by chemical defoliation or other means. Legality would hinge upon a conclusion of military necessity as opposed to something merely of a military benefit. See *United States v. von Leeb*, 10 T.W.C. 1, 11 T.W.C. 541, stating "It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war . . . such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations." See also *United States v. List*, 11 T.W.C. 1252-254. Although Winthrop had stated that property may be destroyed where it is usable for military purpose by the enemy, he adds at 782: ". . . while the burning of isolated private dwellings or buildings may, in rare and exceptional cases, be excused by an emergency of war, the firing of a town or village, unless accidentally caused by its being involved in an engagement . . . is an inexcusable act in violation of the laws of war, not justifiable even by way of retaliation." Military necessity also plays an important role in the legality of the use of chemicals to destroy food. In Vietnam targets should be approved by a province chief, the Vietnamese Army general staff, the U.S. Military Assistance Command, and the U.S. Ambassador, see CBW, *CHEMICAL AND BIOLOGICAL WARFARE* 66 (Rose ed. 1968). To the extent that unnecessary suffering is predictable, criminality is the proper conclusion. The problem seems to be that in some areas hit with chemicals there are supposed to be no noncombatants though in fact there have been many who have returned to their homes. Criminality then would seem to depend upon knowledge of their presence or culpability in a failure to discover their presence. Some have additionally argued that certain effects of chemical usage are uncontrollable and cause indiscriminate suffering.

cept in the definitions of criminal complicity arising out of past war crime trials and in the few provisions of the 1949 Geneva Conventions which relate to joint responsibility. We will focus on the general questions of criminal complicity later, but it would be helpful at this time to explore the possibilities of joint responsibility under the Conventions.

Article 1 of the 1949 Geneva Conventions requires that the United States, as a signatory, "respect" and "ensure respect" for the Conventions "in all circumstances." The language is not specific in regard to the problem of allied responsibility but seems general enough for a basis of argument. Pictet states that the obligation to "ensure respect" means that the state obligations must be implemented in regard to "all those over whom it has authority." But Pictet only states that allies "may, and should," seek certain implementations (not must) and then that all Contracting Parties "should not be content merely to apply its provisions themselves, but *should* do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally."²⁴ This legal obligation is one of the most important in the Conventions for it relates to the joint obligation of all parties to the Geneva Conventions to seek a joint implementation of the law. When this obligation is considered in connection with member obligations under the United Nations Charter, the assertions of Pictet seem legally correct. Article 56 of the U.N. Charter obligates all members of the organization "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Article 55(c) of the Charter sets forth the organizational purpose to promote "universal respect for, and observance of, human rights and fundamental freedoms . . ." (emphasis added), which would include human rights in times of armed conflict found in the four Geneva Conventions. This is an important realization for it is relevant to the responsibilities of nations which are not even parties to the armed conflict in Vietnam to seek a joint, and separate, if necessary, implementation of the Conventions. Thus the obligations go far beyond an inquiry into the conduct of allies and are relevant to international action to secure the rights of prisoners of war and civilians in the war torn areas.

²⁴ IV PICTET at 16. Note also that Article 29 of the Geneva Civilian Convention makes a party responsible for certain acts of its "agents," but the term "agents" is limited "to those persons alone who owe allegiance to the Power concerned" though nationality is not per se an exception to responsibility. See IV PICTET at 212; but cf. language there concerning "puppet" governments and the need to identify the true origin of decisions.

Articles 13 and 16 of the Geneva Civilian Convention together require the United States to assist, protect and respect, as far as military considerations allow, "persons exposed to grave danger." This language can be broadly interpreted to require affirmative conduct during U.S. force sweep operations,²²⁵ but it is doubtful that responsibility exists for the conduct of allies which exposes allied nationals to grave danger *outside* the areas in which U.S. forces are operating and able to act. Furthermore, Article 4 of the Geneva Civilian Convention seems to evidence a general assumption by the drafters that allied relations might best be handled through diplomatic channels rather than through law.²²⁶

Another relevant provision is Article 12 of the Geneva Prisoner of War Convention which requires the United States to "take effective measures to correct the situation or request the return of prisoners of war" upon being notified that a power to whom U.S. forces have transferred prisoners of war is failing to carry out the provisions of the Convention "in any important respect."²²⁷ The article states that responsibility rests with the transferee power, but communist reservations to the article generally declare that the transferor state remains fully liable. Joint responsibility was discussed by the drafters but a system of subsidiary responsibility was preferred in view of the problems connected with an ally interfering in "the affairs of" the receiving power to an unlimited extent.²²⁸ The last provisions concern the obligations of a High Contracting Party to search for any person alleged to have committed or ordered a "grave breach" of the Conventions and to bring such person to trial or extradite him and to "take measures necessary for the suppression of" all other acts contrary to the Conventions.²²⁹

Even taking all of the cited provisions together, the United States responsibility for allied conduct seems rather limited and poorly defined. Certainly, there is not a sufficient community ex-

²²⁵ See Paust, *supra* note 83.

²²⁶ See Article 4, Geneva Civilian Convention; and IV PICTET at 49, stating, "It is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, do not need protection under the Convention."

²²⁷ See also III PICTET at 129-39.

²²⁸ See *id.* at 137. Cf. broad allegations of "complicity in the torture of prisoners by our wards, the South Vietnamese" in TAYLOR at 150, 152.

²²⁹ See, e.g., Article 146, Geneva Convention. Note that it is not clear whether a High Contracting Party must only search for such grave breachers on its own territory or on allied territory as well. Such a search on allied territory could well involve the kind of diplomatic complications envisioned by the drafters. Surely an international investigatory body would be more acceptable for all interests of the parties to the 1949 Geneva Conventions, and such a body could play a troubleshooting role as well.

pectation basis for criminal liability even assuming a demonstrated evil intent (absent actual criminal complicity in the commission of a war crime). The community could do well to define such responsibility more specifically and then to place mutually acceptable requirements in the "must" category rather than the "should". Furthermore, the United States could do well to decide on its own whether it wishes to be an ally of an entity which does not follow the laws of war and, then, what it should do about the situation once violations become known.²³⁰ The present author feels that the United States should actively seek to promote effective implementation of the laws of armed conflict whenever and wherever possible, especially in these times when numerous armed conflicts have a multiple effect on the life and person of an increasingly large number in the human community. In peace we do not live alone—nor do we in war, and though legal responsibility for the conduct of allies is infrequent the world may soon demand more. This nation would serve its beliefs well to lead in that demand.

G. MILITARY NECESSITY AND PROFESSIONAL RESPONSIBILITY

The first myth to identify here is that contributed to by Telford Taylor concerning the denial of specific prohibitions of Convention law when there is a supposed military need to do so. It is stated that prisoners of war can be murdered in certain cases where the principle of military necessity operates.²³¹ It must be vigorously emphasized that in no case may a prisoner of war or any protected person be killed without a fair trial. The United

²³⁰ This is not to suggest that South Vietnam is not in strict compliance with the law of war. Diplomatic means of seeking compliance are, of course, available; but there has been an important and viable suggestion made that Congress take action in connection with foreign aid and military alliance programs to ensure that the laws of war are (1) binding on, and (2) fully implemented by all United States military allies with appropriate inspection and review machinery. The suggestion was made by Professor Gidon Gottlieb, New York Univ., at the Annual Meeting, American Society of International Law, Apr. 30, 1971. For criticism of United States officials in failing to do more than notify the allied government of suspected violations, see *Letters Raise Question of U.S. Responsibility for Allies Atrocities*, N.Y. Times, Feb. 13, 1972, at 4. Compare the duties of the U.S. under common Article 1 of the Geneva Conventions and Article 56 of the U.N. Charter with the practice referred to *id.*, and in *The Herbert Case and the Record*, ARMY, Feb. 1972, at 6, 9-10 (e.g., "The American advisor did not have command authority over the Vietnamese unit. Since all offenders were Vietnamese nationals, the results of the later USACIDA investigation were transferred to U.S. Military Assistance Command, Vietnam, for forwarding to appropriate RVN officials").

²³¹ TAYLOR at 36.

57 MILITARY LAW REVIEW

States position has been clear that even while on patrol, in conditions of danger or stress (which the soldier is bound to get into—he's not a boy scout), or when the principle of military necessity seems to require the killing of captured prisoners, the taking of a prisoner's life would be unlawful and a war crime. FM 27-10, paragraph 85, states:

Killing of Prisoners

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.

This is not a unilateral policy, and even in the absence of specific provisions in the 1949 Geneva Conventions requiring compliance "in all circumstances" and without a military necessity exception unless expressly stated,²³² there exists an exemplification of customary international law which should not be unfamiliar to a war crimes prosecutor. In *United States v. List* the court stated:

Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law. Articles 46, 47, and 50 of the Hague Regulations of 1907 make no exceptions to its enforcement. The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise.²³³

Furthermore, in actual combat situations it is not necessary to kill prisoners of war or other detainees. Effective alternatives are always available.²³⁴ Any argument that the killing

²³² See, e.g., Geneva Civilian Convention, Arts. 1, 3, 4, 16, 27, and 147; and IV PICTET at 16, 200-02, 204-05, 207.

²³³ *United States v. List*, 11 T.W.C. 757, 1255 (1948). Furthermore, FM 27-10, para 3(a), expresses the customary rule found in the 1863 Lieber Code, article 18, that military necessity does not justify conduct or measures which are forbidden by international law. As pointed out in *List* at 1253, destruction of life or property must be incidentally unavoidable or indispensable and in no situation is the killing of a captured prisoner in actual control unavoidable or necessary. See U.S. ARMY SUBJECT SCHEDULE No. 27-1, *The Geneva Conventions of 1949 and Hague Convention No. IV of 1907*, 7, 8 (1970) [hereinafter referred to as ARMY SUBJECT SCHEDULE 27-1]; and HALLECK at 197-98.

²³⁴ See ARMY SUBJECT SCHEDULE 27-1 at 11. (For example, tying the detained person to something or leaving him behind, or calling in a helicopter to evacuate the person who most likely is valuable for intelligence purposes

of defenseless people is necessary to save the lives of one's troops is incredulous and unacceptable. Indeed, any military commander can accomplish his mission without violating the law of war,²³⁵ and by following the law of war the military force is more assured of long term military success. One recent article, for example, emphasizes the military desirability of humane prisoner of war treatment.²³⁶ Combat experience in Vietnam has demonstrated the ease of obtaining vital military information not from torture but from a technique of utilizing humane treatment and a procedure termed "map-tracking." Furthermore, the "map-tracking" technique has demonstrated that there is no need to expose prisoners or others to grave danger in order to find hidden land mines or other objects since exact locations can be map-tracked or even identified from field photographs. The only real limitation on the creation of humane techniques might be desire.

The next myth concerns a belief that our troops do not need to follow the law when the enemy does not. This is simply not true legally,²³⁷ and is incredible to concerned Americans and soldiers with any sense of professional pride and responsibility. Military conduct should be one of the highest standards of socially acceptable conduct found in the law. This is and has been an Army of "civilian" orientation. Ultimate control and purpose is a civilian function, and one of the great legal norms in the American tradition is found in the phrase that no man or group of men are higher than the law. Law is not a civilian interference; it is a military requirement in any democracy.

General Harold K. Johnson once stated, "Our duty as soldiers is to defend the Constitution and to uphold the laws that flow from its basic provisions. Under our Constitution, treaties made by the United States with other nations become part of our laws." The American soldier has a legal obligation to follow the law even though the enemy does not; he took an oath to obey the

and could provide information to save hundreds of lives if handled in a proper way by experienced interrogators in compliance with humane standards.) To kill the detainee is to fail in the overall mission responsibilities and to view your small effort as the only important effort in the war—an assumption that is simply not true and fails to realize the broad benefits involved in complying with superior directives even for the selfish soldier of limited perceptive ability.

²³⁵ *Id.* at 5.

²³⁶ *Where is the Enemy?*, ARMY 46 (Jun. 1971). The author does state, however, that speedy evacuation is counter-productive to proper map-tracking.

²³⁷ The Nazis attempted to justify their acts on the basis of a spurious concept labeled *tu quoque* ("you also"), but the concept was denied as a defense to criminal liability. See, e.g., *United States v. von Leeb*, 10 T.W.C. 1, 11 T.W.C. 482 (1948).

57 MILITARY LAW REVIEW

law at all times. To do less would only violate the law and the sanctity of that oath.

There is another duty of the soldier which goes beyond strict legal obligations—it goes to the very purpose in having an American Army. General Douglas MacArthur described the essence of a soldier's duty while confirming the death sentence on General Tomayuki Yamashita in 1946 as follows:

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits—sacrifice.

Protection, honor and sacrifice—these qualities do not depend on what the enemy is doing. Compliance with the law is not always easy for the soldier; that's why we call on him for honor and self-sacrifice in conformity with long standing military tradition.²²⁵

Patriotism is a word sometimes misunderstood or misused. But the essence of a soldier's patriotism is to be found in the expressions of Generals MacArthur and Johnson, and, at the very least, in conformity with the law. You are not patriotic merely by displaying the flag, staying in the armed forces until retirement, or deciding that you are beyond the law. In fact, to think that you are beyond the law and to disobey it is to destroy law and order, deface patriotism and religious convictions, and defile a long history of honorable military tradition perhaps only on the shallow and gutless reason that the enemy is doing it also.

There are even more practical reasons for those who are hypocritical about our Constitution, law and order, oaths, religion, military tradition, or duty-honor-country. There are reasons why we should follow the law of war for military self-interest if not the national self-interest. In a recent article General Hamilton H. Howze identified the first of these when he described My Lai as "apparent cases of indiscipline—gross breakdowns of the American military system. . . . [I]n the last analysis it is the *authority of the commander* which gets the job done when that job is really tough to do."²²⁶ If troops are violating the law of war, in many cases the commander has lost control over his troops and

²²⁵ See, e.g., Lieber Code, 1863, art. 15, stating, "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."

²²⁶ Howze, *Military Discipline and National Security*, ARMY 11, 12 (1971).

there exists a state of partial anarchy at a critical military moment. Lack of control jeopardizes the security of the unit perhaps at a time when force security and efficiency is most in need.

Another self-interest factor is found in the term reciprocity. If troops are not concerned with what can happen to them after capture, they might take a moment to consider the plight of hundreds of American servicemen held by the enemy in Southeast Asia. Troop conduct *can* help them indirectly even though the enemy does not always follow the law itself.

Still another self-interest factor in following the law of war, though the enemy does not, concerns public opinion. World public opinion generally is very important to the United States, but home support and Vietnamese pacification are the two most relevant audiences. What is directly relevant to the soldier is the local public opinion efforts found in psyop support measures to help the commander carry out his military mission in conformity with the diplomatic mission.²⁴⁰ The purpose of combat is not simply to take an area, but to win people—and this is especially true in guerrilla warfare. As Mao Tse Tung has warned, the guerrilla is like a fish in the sea and cannot survive without the sea of local populace support. War crimes help ensure his local support and make the soldier's job tougher if not more frustrating or impossible. The bitterness created by war crimes can cause the defeat of the greatest armies by uniting neutral support or lack of concern into active guerrilla support.²⁴¹

²⁴⁰ See TAYLOR at 191-200 concerning the need to make a success of the civic action programs, to avoid alienating the local populace, to treat civilians as human beings instead of allowing racial prejudice to grow and spread, to make military policy and actual force action conform to the United States mission, to adopt new tactics to implement the above into training and field action with emphasis on trouble-shooting teams to assure correct implementation, and to pay attention to the lessons found in military history and as demonstrated in numerous political and military effects which arise inevitably from unheroic massacres and other violations of the law of war.

²⁴¹ In our own history there is an example of what criminal action can create for the force commander and the nation. In the spring of 1864 Reverend Chivington, Colonel of the 3rd Colorado volunteers, wanted to erase his unit's name the "Bloodless Third." His unit had not seen actual combat and was frustrated. In an action known as the Sand Creek Massacre, in which two-thirds of the Indian peaceful encampment had been women and children, Colonel Chivington proved that he could run down Indians who were unsuspecting and on a mission to conclude peace. Almost everyone in the camp was massacred with a racially prejudiced attitude expressed by the colonel himself: "Kill and scalp all big and little; nits make lice." Some survived only by hiding under the bodies of their bretheren or in a stream bank; and the brave soldiers took scalps and other evidence back to Denver for public display. They were not court-martialed, though Kit Carson called them cowards and dogs. Their action cost the United States another four

Finally there is one other self-interest reason for following the law of war though the enemy does not. If during a military career the soldier disregards the law, society has the right to restrain his conduct by either convicting him as a war criminal or violator of military law, or by discharging him from the service. (The latter denies his participation in any future military activities after he has demonstrated a dangerous quality which society simply cannot afford to be exercised again—this is true “preventive law” when exercised.)

A final comment concerns the effect of the law on freedom of action in combat. As alluded to before, generally the law of war does not at all hamper troop freedom to engage military targets or perform their job on the battlefield. The law merely limits the freedom to murder, torture or injure people once they have been captured and brought under control, or the discretion to use massive firepower in an indiscriminate manner. Soldiers on the front lines do not even have to concern themselves with the legal status of detainees. They should treat all humanely and speed them to the rear so that professionals who know how to interrogate can obtain trustworthy information quickly and then separate people into legal categories and provide the necessary treatment. The soldier must stick to his job. He is not a judge and jury to determine the life or injury of persons he captures, and while he is torturing or mistreating innocent or helpless people, the enemy that he is supposed to encounter may be escaping to render him more frustrated than before. What a military failure to disobey the law, and what a cowardly deed to “fight” the helpless or execute a small, frightened and truly innocent child.

V. INDIVIDUAL GUILT AND THE LAW OF WAR

A. THE STANDARDS OF ACCOUNTABILITY

We should not attempt here to define such elusive concepts as “aggressive war” when it seems that those more expert in such matters have been unable to do so for at least a quarter of a century. Furthermore, where “[e]minently respectable and learned voices are raised on both sides of the debate” concerning the legality of the United States participation in the Vietnamese

years of unnecessary Indian war and an expenditure of a substantial sum for the times—\$30 million to continue fighting motivated by a massacre which united Indian tribes previously antagonistic to each other. See, e.g., GRINNEL, *THE FIGHTING CHEYENNES* (1915).

conflict,²⁴² the present author will not presume to know the answers which have escaped a common acceptance even among learned scholars. We will focus instead on the personal guilt associated with violations of the law of war, recognizing at this point that participation alone in even a criminal war does not constitute a sufficient basis for personal criminal guilt.²⁴³ As Telford Taylor asserts in disagreeing with Richard Falk's argument that guilt comes with knowledgeable participation in a criminal war, "the Nuremberg judgments . . . have no such wide embrace. Those convicted at both Nuremberg and Tokyo of 'crimes against peace' were all part of the inner circles of leadership, and the Nuremberg acquittals of generals and industrialists cut directly against Professor Falk's argument."²⁴⁴ It was stated at Nuremberg that although the criminality of an organization can be analogous to the concept of conspiracy, membership alone in a criminal organization is not enough. Persons with "no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership," should at any rate be excluded from criminal prosecution "unless they were personally implicated in the commission of" criminal acts.²⁴⁵

Furthermore, the Nuremberg Tribunal declared that membership in the armed forces or even an elite command structure is not a sufficient basis for prosecution absent personal guilt.²⁴⁶ It added that the German General Staff and High Command was neither an "organization" nor a "group" within the meaning of the normative precepts under consideration, and that the individual could not know he was joining a "group" or "organization" for such did not exist.

The Tokyo Tribunal "did not maintain that every member of the Japanese armed forces committed murder, or a punishable crime, in World War II. Common soldiers are entitled to presume

²⁴² See TAYLOR at 97, 99, "the depth of disagreement among men of integrity and intelligence suggests that at least the issues are far from simple"; and I, II, & III, *THE VIETNAM WAR AND INTERNATIONAL LAW* (R. Falk ed. 1968, 1969 and 1972).

²⁴³ See TRIAL OF THE MAJOR WAR CRIMINALS, NUREMBERG, *supra* note 13; Fite, *The Nuremberg Judgment: A Summary*, 16 DEP'T STATE BULL. 9, 16-19 (1947).

²⁴⁴ TAYLOR at 119. See TAYLOR at 86 and 88 on the number of acquittals of persons at Nuremberg and Tokyo on the aggressive war charges.

²⁴⁵ Fite, *supra* note 243 at 16. This is another way of saying that criminal guilt is personal or that an Army or armed force is not itself guilty of a crime. See *Switkes v. Laird*, 316 F. Supp. 358, 365 (S.D.N.Y. 1970), stating, "If war crimes are being committed in Indochina, not every member of the armed forces there is an accomplice to those crimes."

²⁴⁶ *Id.* at 19. See also O'Brien, *supra* note 184 at 197 n. 9, for a valuable survey of tribunal holdings.

57 MILITARY LAW REVIEW

the justice of their nation's war because they are almost always not in possession of sufficient facts to make a proper judgment," and should not be declared criminals per se "even though the war itself was actually criminal."²⁴⁷ Furthermore, the crime of conspiracy "is not possible if a person is in such ignorance of the factual situation that he does not know he is entering into a criminal agreement or plan, and if he may not be held to the duty of knowledge as a reasonable man."²⁴⁸

B. COMPLICITY

There can be a crime of complicity,²⁴⁹ but complicity does not include the actions of all those contributing to the crime "in the normal exercise of their duties."²⁵⁰ Complicity involves more than a contribution, it involves a necessary guilty intent.²⁵¹ We should not forget, however, that society can act to remove from the armed forces those individuals who though lacking any subjective mental guilt or moral wrong-doing have nevertheless demonstrated a dangerous quality which society can ill-afford to be exercised.²⁵²

There have been few efforts at defining the international standards of complicity. During the Diplomatic Conference on the 1949 Geneva Conventions it was even decided that such matters "should be left to the judges who would apply the national laws" enacted to punish grave breaches of the Conventions.²⁵³ Pictet in his commentary states that in the Convention law there is:

²⁴⁷ KEENAN & BROWN, *CRIMES AGAINST INTERNATIONAL LAW* 135 (1950). This should be especially true regarding the Vietnamese conflict when the experts themselves are locked in disagreement.

²⁴⁸ *Id.*

²⁴⁹ Principle VII, *Principles of the Nuremberg Charter and Judgment*, 5 U.N. GAOR, Supp. 12, U.N. Doc. A/1316 (1950). See also *Draft Code of Offenses Against the Peace and Security of Mankind*, art. 2(13), U.N. Int'l L. Comm'n, 9 U.N. GAOR, Supp. 9, at 11-12, U.N. Doc. A/2600 (1954); and *Trial of Accused War Criminals*, Sec. 6, Rule 47, Order of General MacArthur, General H.Q., U.N. Command, Tokyo, Japan, AG 000.5 (Oct. 28, 1950).

²⁵⁰ GREENSPAN, *THE MODERN LAW OF LAND WARFARE*, 469 (1959), citing U.N. Int'l L. Comm'n, U.N. Doc. A/CN.4/48 (1951). See also *Switkes v. Laird*, 316 F. Supp. 358, 365 (S.D.N.Y. 1970).

²⁵¹ *Id.* See also GREENSPAN, *supra* note 250, at 35 n.241, for examples of a finding of criminal intent based on a common design to violate the laws of war.

²⁵² That international norms recognize society's right to protect itself from the "dangerous" non-criminal, see KEENAN & BROWN, *CRIMES AGAINST INTERNATIONAL LAW* 137 (1950).

²⁵³ See 2 B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, 115 (1949).

joint responsibility of the author of an act and the man who orders it to be done. It will be possible to prosecute them both as accomplices. There is no mention, however, of the responsibility which might be incurred by persons who do not intervene to prevent or to put an end to a breach of the Conventions. In several cases of this type the Allied courts brought in a verdict of guilty. In view of the Convention's silence on this point, it will have to be determined under municipal law. . . .²⁵⁴

One of the U.S. standards in 1914 was that where an entire "body of troops, systematically disregards the law of war, e.g., by refusal of quarter, any individuals belonging to it who are taken prisoner may be treated as *implicated* in the offense." (Emphasis supplied.)²⁵⁵ During the Korean War a standard was expressed in the United Nations Command order that anyone who commits an offense "or who aids, abets, counsels, commands, permits, induces, or procures its commission, is a principal."²⁵⁶ Winthrop also referred to a complicitous offense through "taking part in" maltreatment or failure in the care of prisoners,²⁵⁷ but it is not clear by what criteria one was judged in the early days.

After World War II there were several convictions for complicitous conduct though judgments did not go into great detail in describing the guidelines used. In the *Trial of Lt. Gen. Kurt Maelzer*,²⁵⁸ the general was found guilty of exposing prisoners in his custody to acts of violence, insults and public curiosity by ordering American and British prisoners of war to be paraded in the streets of Rome in 1944. According to witnesses, the population threw stones and sticks at the prisoners. The general's guilt was hinged partially on the joint action of exposure and public infliction of injury. A similar result was reached in the *Borkum Island* case when civilians brutalized and killed U.S. fliers who had been paraded through the streets of the Island in 1944.²⁵⁹ Some members of the German guard who *stood by* as the civilians inflicted injury and death were convicted along with the commander who ordered the parading of troops and the Burgomeister and four civilians who took part in the incident. In the *Trial of Major Rauer and Six others*,²⁶⁰ four officers charged with

²⁵⁴ IV PICTET at 591.

²⁵⁵ U.S. War Dep't, *Rules of Land Warfare*, para 367 (1914, GPO 1917).

²⁵⁶ *Trial of Accused War Criminals*, U.N. Command Order, *supra* note 249.

²⁵⁷ WINTHROP at 791.

²⁵⁸ 11 L.R.T.W.C. 53 (1949).

²⁵⁹ Case No. 12-489, *United States v. Kurt Goebell, et al* (Dachau, Germany), see Report, SURVEY OF THE TRIALS OF WAR CRIMES HELD AT DACHAU GERMANY ("The Simpson Report" to the Secretary of the Army) at 2-3 (Sep. 14, 1948) [hereinafter cited as *The Simpson Report*].

²⁶⁰ 4 L.R.T.W.C. 113, 116 (1948).

57 MILITARY LAW REVIEW

being "concerned in" the killing of allied prisoners were convicted after the judge advocate pointed out that the prosecution had maintained that none of the killings could have occurred without the connivance, direction and complicity of the commander and his adjutant under the circumstances. At least three other cases found persons guilty of complicity,³⁰¹ but more revealing language is found in *The Alamo Trial*,³⁰² where the defendants were found to have known that the purpose of their assembly in the woods was to kill prisoners of war and civilian detainees. The report on the trial stated that under the circumstances:

If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were equally guilty in law. [Emphasis supplied.]

One had commanded the group, one did the actual shooting, and another "assisted by staying at the car and preventing strangers from disturbing the other two while they were engaged in the crime."³⁰³

Although not entirely revealing of the measurement of guilt, these cases and pronouncements evidence an international norm of complicitous guilt which should be relevant to war crimes prosecutions in the future. It seems that in no case has mere presence at an incident been sufficient to constitute a crime. But what further conduct would constitute aiding and abetting the commission of war crimes or some accessory responsibility is not known with sufficient exactitude for "line-drawing" purposes. We know that some sort of criminal intent is necessary for a criminal prosecution involving complicitous conduct, but it seems that the intent can be minimally shown by circumstantial factors. There seem to be no charges for complicitous conduct arising from

³⁰¹ *United States v. Milch*, 2 T.W.C. 355, 854, 857 (1949); *Trial of Gustav Becker, Wilhelm Weber and Eighteen Others*, 7 L.R.T.W.C. 67, 70 (1948); and *Trial of Franz Holstein and Twenty-three Others*, 8 L.R.T.W.C. 22, 31-33 (1949). See also *The Simpson Report* at 2 (U.S. v. Otto Pauly et al), 4 (Beck and Weinreich), and 5 (Engelneiderhammer).

³⁰² 1 L.R.T.W.C. 35, 43 (1947).

³⁰³ *Id.* See allegation that two American officers "stood by and watched and made no attempt to stop the mistreatment" of suspects being interrogated by South Vietnamese interpreters concerning the problem of defining and investigating complicity in the commission of war crimes in the Vietnamese conflict. *U.S. Admits Violations of Geneva Code in Treatment of PWs*, *Philadelphia Inquirer*, Nov. 2, 1969, at 2. *Medina Says South Vietnam's Police Killed 2 He Is Accused of Murdering*, *N.Y. Times*, Aug. 12, 1970 at 10; and *Finger Maiming Is Laid to Kotouc*, *N.Y. Times*, Apr. 27, 1971, at 10 (allegations of complicitous conduct with South Vietnamese).

Vietnam war crimes or prohibited acts. In the trial of Captain Kotouc for finger maiming it seems that no such charges were brought; nor even charges of the lesser offenses of assault or conduct in violation of Article 17 of the 1949 Geneva Prisoner of War Convention of such a nature as to bring discredit upon the armed forces. Captain Kotouc was acquitted in April 1971, apparently on the ground that the maiming itself was accidental. Similarly, no such charges, or even charges of dereliction of duty, appear in the Medina trial.²⁶⁴

Although there were apparent failures of some American advisors to intervene to suggest to our allies that troops desist from violating the law, apparently no action has been taken against any U.S. advisor. It has been suggested in excuse that American advisors "did not have *command* authority over the Vietnamese,"²⁶⁵ but past cases clearly demonstrate that one need not have command authority to violate standards of criminal complicity. Additionally, it is no excuse that those who commit the actual injury are allies when the crime of complicity has been committed.

C. DURESS

Duress as a defense to violations of the law of war does not seem entirely relevant to complicitous criminality, but a discussion of the standard is important in our general inquiry into group conduct and defenses. When a soldier does an act known to be in violation of the law of war, he cannot plead duress as a defense unless there is "a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of his freedom to choose the

²⁶⁴ It is arguable, however, that actual dereliction of duty (an offense under article 92 of the UCMJ) is punishable under the charge of murder in violation of article 118 of the UCMJ where such conduct led directly to the death of the relevant persons. A dereliction of duty of such a nature as to evince a wanton disregard for human life and which is inherently dangerous to others could constitute the conduct relevant to a murder charge (dereliction would become the relevant act or omission). Furthermore, it is arguable that in such a case the dereliction of duty would be a lesser included offense to such a murder charge (article 79, UCMJ). Also included in the charge of murder are the lesser offenses of voluntary or involuntary manslaughter (article 119, UCMJ) and negligent homicide (article 134, UCMJ). Cf., events which took place concerning the prosecution of Captain Medina in: 101 of 102 Medina Murder Counts Cut, Wash. Post, Sep. 18, 1971, at A1 and A4. Captain Medina was eventually found innocent of the remaining charges; Wash. Post, Sep. 23, 1971, at A1. The charge to the jury in the Medina case has been questioned by Telford Taylor, see *The Course of Military Justice*, N.Y. Times, Feb. 2, 1972, at 37 M.

²⁶⁵ See *The Herbert Case and the Record*, ARMY, Feb. 1972, at 6, 9-10.

right and refrain from the wrong."²⁶⁶ It would not be sufficient to argue that the sergeant or lieutenant wouldn't want the soldier to disobey their order. There must be an honest belief of an immediate threat of physical harm.²⁶⁷ "Servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense."²⁶⁸ It has also been stated that the threatened harm "must be more serious than the harm which will result to others from the act to be performed."²⁶⁹

D. THE DEFENSE OF SUPERIOR ORDERS

This brings us to the next consideration in group conduct and criminal violations of the law of war—the defense of superior orders. In our inquiry it would be beneficial to start with the present United States position on the relevance of superior orders as a complete defense, partial defense, or no defense at all. FM 27-10, paragraph 509, reads:

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure

²⁶⁶ *United States v. von Leeb*, 10 T.W.C. 1, 11 T.W.C. 509 (1948). See also *United States v. Ohlendorf*, 4 T.W.C. 480 (1949).

²⁶⁷ See *U.S. Dep't of Navy, Law of Naval Warfare*, para 330b(1) (Change 2, 1949) (NWIP 102 1955); *U.S. Dep't of Army Pamphlet No. 27-161-2, II International Law 247-48* (1962); and *ARMY SUBJECT SCHEDULE 27-1*, at 11-12, stating that no one can (of right) force you to commit a crime, that you must disobey an order to commit a criminal act, that lack of courage is no defense to a charge of murder, pillage or any other war crime, and that the American soldier is "obligated to report any violations of the law of war."

²⁶⁸ *United States v. von Leeb*, 10 T.W.C. 1, 11 T.W.C. 509 (1948).

²⁶⁹ *DA PAM 27-161-2*, *supra* note 267 at 248, citing 15 L.R.T.W.C. 170-75 (1949) on the plea of duress.

of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (e.g., UCMJ, Art. 92).

Another Army text states:

The plea is valid if the accused does not and should not have known that the order was illegal. Many courts use the language "illegal on its face" to express the proposition that the illegality of the order must be obvious before the accused should be held liable for an act committed pursuant to that order. The reasoning is justified on the grounds that soldiers acting in wartime are trained to follow orders of their superiors relatively automatically, and would not normally be expected to question those orders except where their invalidity was fairly obvious.⁷⁰

The new Army Subject Schedule is in line with the above. In describing culpability in the group situation it states that acting under superior orders "is no defense to criminal charges when the order is clearly illegal as is an order to kill a prisoner of war. While an American soldier must obey promptly all legal orders, he also must disobey an order which requires him to commit a criminal act in violation of the law of war."⁷¹ Furthermore, a soldier should not presume that an order asks for criminal conduct; rather the soldier should ask the superior for clarification and if the order as clarified is illegal, the soldier must try to have the order rescinded, disregard the order if the superior persists, and also report the incident to higher headquarters or an alternative source.⁷² This sometimes takes courage but if the soldier fails to disobey the illegal order, he can be tried and punished for committing a criminal act in violation of the law of war. The commander has a responsibility to see that his troops obey the law of war. The soldier can only serve his commander and this nation by obeying lawful orders. No commander needs his unlawful orders obeyed, and the commander must have them disobeyed if he is to carry out his own responsibilities.

It should be remembered that the average soldier is asked only to disobey (1) orders he personally *knows* to be illegal and (2) orders which are *obviously* illegal such as the murder of captured detainees under force control, the deliberate attack with machine-

⁷⁰ *Id.* at 251. See also, *Law of Naval Warfare*, *supra* note 267 at para 330b (1).

⁷¹ ARMY SUBJECT SCHEDULE 27-1, at 10. See also *United States v. List*, 11 T.W.C. 757, 1236 (1948).

⁷² ARMY SUBJECT SCHEDULE 27-1, at 11-12. An order to commit a criminal act is itself illegal, *id.* at 10; and the soldier must now report *all* known or suspected violations of the law of war through the chain of command or the Inspector General, the military police, a judge advocate or the chaplain.

gun fire on civilians when there is no military necessity or military target, the torture or abuse of a prisoner in order to "get him to talk," or an order to place civilians ahead of a unit to "clear" a field of land mines.²⁷³ In doubtful cases the responsibility rests with the superior giving the order, not the subordinate who obeys it—he can presume legality until an obviously illegal order arises.²⁷⁴

Contrary to the opinion of Telford Taylor, the defense of superior orders does not have its true base "in equity,"²⁷⁵ but rather in a concept to spare soldiers from criminal prosecution in group action or chain action situations when the lower ranking soldier does not possess the requisite criminal mind or criminal culpability. It has its true base in *mens rea* (knew) and dangerous character (should have known)—though Telford Taylor is certainly correct that superior encouragement or force may be offered in mitigation of punishment perhaps even to the point in extreme cases where "punishment" is nonexistent.²⁷⁶ On subordinate criminal responsibility Oppenheim adds:

Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders received as a measure of reprisals.²⁷⁷

Of course, Oppenheim recognizes the need to disobey and at least seek clarification of orders "obviously unlawful."

Winthrop had early stated that except in instances of palpable illegality, the inferior should presume that the order was lawful and he will not be prosecuted if he so acts. But if the order is manifestly beyond the legal power or discretion of the commander, an exception exists to the rule of obedience and the soldier

²⁷³ See *id.* at 10; and SPAIGHT, *AIR POWER AND WAR RIGHTS* 57 (3d ed. 1947).

²⁷⁴ See TAYLOR at 49-50, 52; and *United States v. List*, 11 T.W.C. 757, 1236 (1948).

²⁷⁵ TAYLOR at 160, *cf.* his probable intent at 49 where he distinguishes between knowledge and fear.

²⁷⁶ Consider also the separate defense of duress. See TAYLOR at 50.

²⁷⁷ II OPPENHEIM at 568-69. See also *United States v. List*, 11 T.W.C. 757, 1236 (1948), stating "if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary for the commission of a crime exists and the inferior will be protected."

can be liable for his conduct.²⁷⁸ The United States has considered the doctrine of superior orders almost as long as the nation has existed, and except for minor interruption from 1914 until 1944 (c.f. Winthrop above, 1920), the doctrine seems to have always coincided with that of international law and the present phrase that a subordinate remains responsible for criminal conduct if he *knew or should have known* that what he was ordered to do was illegal.²⁷⁹

²⁷⁸ WINTHROP at 296-97; and see *id.* at 780 n.31, citing *Christian County Court v. Rankin*, 2 Duvall 502, where civil damages were imposed on a soldier for assisting, though under the orders of a superior, in the destruction by burning of a courthouse during the Civil War. For an English case in 1900 acquitting a soldier honestly doing his duty where the order was said to be not so manifestly illegal that he must have known it to be illegal, see *Stephen, Superior Orders As Excuse for Homicide*, 17 L.Q. REV. 87, 88 (1901) (case of *Regina v. Smith*).

²⁷⁹ See Wilner, *Superior Orders as a Defense to Violations of International Criminal Law*, 26 MD. L. REV. 127 (1966), adding historic terms to our inquiry as to what constitutes an obviously illegal order which the subordinate "should have known" to be criminal. The terms or phrases used in the past were: plain, apparent, obvious, patent, palpable, manifest, clear, "known by most," and "one must instinctively feel." It is clear that the test is objective, not merely the subjective *knew* (though confusion and different standards did arise at times); furthermore, people who have acted with malice have been punished even absent a *knew* or *should have known* proof (apparently punishing the guilty mind). As to the intervening practice of the United States from 1914 to 1944, see *U.S. War Dep't, Rules of Land Warfare*, para 366, cf. para 367 (1914), GPO 1917, and FM 27-10, para 347 (1940), changed on Nov. 15, 1944, by para 345.1 to allow superior orders only as a partial defense (where the accused did not know and should not have known of the illegality connected with the order). It should be noted that from 1914-1944 there was only a change in the military manuals and a few military trials—no change existed in the decisions of the federal courts and the law seems to have remained despite temporal interruption through executive changes in enforcement policy. The language in WINTHROP, at 296-97, strongly suggests that the United States followed a partial defense theory at least through 1920 even though conflicting language existed in the early texts from 1914 to 1944. It should be noted that the 1940 paragraph 347 merely stated that persons who commit offenses under the orders or sanction of their government or commanders "will not be punished." It does not say that such persons have not committed any crime. Therefore, it seems perfectly consistent to state that although individuals can also commit a crime while acting under the orders of a superior, the United States policy of 1940-1944 was not to punish such persons. For U.S. foreign and international standards past and present see SPAIGHT, *AIR POWER AND WAR RIGHTS* 57-58 (3d ed. 1947); DINSTEN, *THE DEFENSE OF OBEDIENCE TO SUPERIOR ORDERS IN INTERNATIONAL LAW* (1965); II OPPENHEIM at 568-72; GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 490-96 (1959); McDUGAL at 692-98; Netherland's case reported at 50 AM. J.I.L. 968, 969 (1956); a recent German case at 57 AM. J.I.L. 139, 140 (1963); Sack, *Punishment of War Criminals and the Defense of Superior Orders*, 60 L.Q. REV. 63 (1944); Dunbar, *Some Aspects of the Problem of Superior Orders in the Law of War*, 63 JURID. REV. 234 (1951); and Norene, *Obedience to Orders as a Defense to a Criminal Act* (unpublished JAG School thesis, 1971).

57 MILITARY LAW REVIEW

In the Korean conflict the board in review in *United States v. Kinder*²⁸⁰ made the following statement:

It is the heart of the principle of law . . . that a soldier or airman is not an automaton but a "reasoning agent" who is under a duty to exercise judgment in obeying the orders of a superior officer to the extent, that where such orders are manifestly beyond the scope of the issuing officer's authority and are so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal, then the fact of obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders.

During the Vietnamese conflict at least two cases ruled that the defense request for an instruction on the defense of superior orders can be denied where it is determined as a matter of law that the order in question was obviously or palpably illegal.²⁸¹ Instructions were given on the defense of superior orders in the recent cases of *United States v. Hutto*²⁸² and *United States v. Calley*.²⁸³ The instructions were different but both were of such a nature as to comply with the general standard of "knew or should have known,"²⁸⁴ and to define "manifestly illegal or un-

²⁸⁰ 14 C.M.R. 742, 776 (AFBR 1954). See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para 216d; and *Trial of Accused War Criminals*, *supra* note 249, rule 46.

²⁸¹ See *United States v. Schultz*, 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969); and *United States v. Griffen*, 39 C.M.R. 586 (ABR 1968).

²⁸² General court-martial convened pursuant to CMAO 37 (Sep. 17, 1970), HQ Third U.S. Army. Findings of not guilty announced Jan. 15, 1971.

²⁸³ General court-martial convened pursuant to CMAO 70 (Nov 24, 1969), HQ U.S. Army Infantry Center, Fort Benning, Georgia. Findings of guilty announced Mar. 29, 1971.

²⁸⁴ The instructions are partially quoted in Norene, *supra* note 279 at 68-77, 79-81. In the Hutto case the judge stated, "You must resolve from the evidence and the law whether or not the order as allegedly given was manifestly illegal on its face, or if you are not satisfied beyond a reasonable doubt that the alleged order was manifestly illegal on its face, whether or not the order, even though illegal, as I have ruled it was, was known to the accused, Sgt. Hutto to be illegal or that by carrying out the alleged order Sgt. Hutto knew he was committing an illegal and criminal act" (emphasis added); and again, "unless you find beyond a reasonable doubt that the order given to the accused in this case was manifestly unlawful as I have defined the term, you must acquit the accused unless you find beyond a reasonable doubt that the accused had actual knowledge that the order was unlawful or that obedience of that order would result in the commission of an illegal and criminal act." In the Calley case the judge stated, "acts of a subordinate done in compliance with an unlawful order given him by his superior are excused . . . unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful"; and "Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful you must

lawful" as that which a person of ordinary sense and understanding would know, if under the same or similar circumstances, to be unlawful.²⁸⁵

E. THE LIMITS OF LEADER RESPONSIBILITY

There are limits to leader responsibility. A commander is not criminally responsible for all that his troops "do or fail to do," and "advanced systems of criminal law accept the principle that guilt is personal,"²⁸⁶ Grotius and others near his time accepted the normative value "that no one who was innocent of wrong may be punished for the wrong done by another."²⁸⁷ This notion seems to permeate present international law as evidenced in rules against collective punishment. Indeed, in *United States v. von Leeb*, Judge Harding stated that responsibility is not unlimited and:

It is fixed according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government. As pointed out heretofore, his criminal responsibility is personal.

A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. . . . There must be personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.²⁸⁸

It seems that the court stated that absent direct responsibility, as in the case of the commander issuing illegal orders, a commander to be criminally liable must have knowledge of the com-

proceed to determine whether, under the circumstances, a man of ordinary sense and understanding would have known the order was unlawful."

²⁸⁵ *Id.* at 71, 74 (Hutto case).

²⁸⁶ See Wright, *International Law and Guilt by Association*, 43 AM. J.I.L. 746 (1949), attacking the system of reprisals as a symptom of lawlessness and barbarism (also "wars, reprisals and sanctions with punitive intent").

²⁸⁷ *Id.* at 751. But, at the same time, Grotius recognized that "a community, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it." II GROTIUS, *DE JURE BELLI AC PACIS* 523 (C.E.I.P. ed., Kelsey trans. 1925). See also IV E. DE Vattel, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE* 163 (C.E.I.P. ed., Fenwick trans. 1916). The writings of these two jurists add centuries of experience and expectation to the present norm.

²⁸⁸ 10 T.W.C. 1, 11 T.W.C. 543-44 (1948).

57 MILITARY LAW REVIEW

mission of patently criminal offenses or offenses he personally knows to be illegal and (1) acquiesce in, (2) participate in, or (3) be criminally negligent in regard to the offenses.²⁸⁹ Other cases seem to fit into a general rule that the commander can be held criminally responsible if he *had knowledge* or *should have had knowledge* of troop conduct in violation of the law of war and, then, *took no reasonable corrective action*. With regard to corrective action, prosecutions have been based partially on the failure to control troops, disregard of troop conduct, acquiescence in troop activity, dereliction of duty, general complicity (incitement, approval, aiding and abetting, accessory responsibility, conspiracy), failure to educate troops or suppress crime, failure to prosecute troops who violate the law, failure to enforce the law generally, failure to maintain troop discipline, failure to investigate incidents, failure to report incidents to higher authorities, and at least in one case failure to resign from office. Many of these are interrelated and are tied to dereliction of duty in the general sense of the phrase "failure to take reasonable corrective commander action."

The United States view, which is consistent with international normative precepts, can be found in FM 27-10, paragraphs 501 and 507(b) which state:

501. Responsibility for Acts of Subordinates

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

507(b)

... Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

The Navy text states that the commander is responsible for

²⁸⁹ *Id.* at 545-47. Indeed, this seems to have been the customary rule as expressed by Grotius and Vattel, *supra* note 287, and we have changed this precept very little over the centuries.

acts of his subordinates when such acts are committed "by order, authorization, or acquiescence of a superior." The fact that the commander did not order, authorize, or acquiesce in illegal conduct does not relieve him from responsibility if "it is established that the superior failed to exercise his authority to prevent such acts and, in addition, did not take reasonable measures to discover and stop offenses already perpetrated."²⁰⁰

Early texts stated that commanders ordering illegal acts or "under whose authority they are committed" may be punished.²⁰¹ Article 71 of the 1863 Lieber Code stated that whoever intentionally inflicts additional wounds on an enemy already disabled "or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy. . . ." In 1866 General Halleck stated in his text that when atrocities are committed, associated with scenes of drunkenness, lust, rapine, plunder, cruelty, murder and ferocity, the atrocities and the commander responsible are not excused "on the ground that the soldiers could not be controlled. . . . An officer is generally responsible for the acts of those under his orders. . . . In the same way, rebel officers were responsible for the murder of our captured negro troops, whether or not by their orders."²⁰²

By 1916 it was stated that by Article 54 of the 1916 Articles of War a commander has a duty of insuring "to the utmost of his power, redress of all abuses and disorders which may be committed by an officer or soldier under his command."²⁰³ An ex-

²⁰⁰ *Law of Naval Warfare*, *supra* note 267 at para 330b(4). See also III MANUAL OF MILITARY LAW, "The Law of War on Land 178 (British War Office 1958), stating that the commander is responsible if he knew or should have known of illegality committed or about to be committed and he "fails to use the means at his disposal to ensure compliance with the law of war," and that the failure raises a presumption (not easily rebuttable) of connivance, authorization, encouragement, acquiescence, or subsequent ratification. It is also stated, "it is probable that the responsibility of the commander goes beyond the duty as formulated above. He is also responsible if he fails, negligently or deliberately, to ensure by all the means at his disposal that the guilty are brought to trial, deprived of their command or ordered out of the theatre of war, as may be appropriate" (emphasis added). See *id.* at 179 for references to Canadian, Dutch and French law.

²⁰¹ *Rules of Land Warfare*, *supra* note 255 at para 366.

²⁰² HALLECK at 199 (1866). Recall the commander responsibility for troop action in Canada during the War of 1812.

²⁰³ Statement of Quincy Wright quoted at Colby, *Courts-Martial and the Laws of War*, 17 AM. J.I.L. 109, 110 n.3 (1923). Captain Colby disagreed with any implication that article 54 could be used "in connection with mere neglect to enforce laws," (emphasis added) *id.* at 114, but added that enforcement is not merely within the discretion of the commander.

57 MILITARY LAW REVIEW

treme attitude concerning high level command responsibility was expressed as follows.

When long range guns bombard Paris, when toxic gases are used in battle, when airplanes destroy towns of noncombatants on the suspicion that they were used for enemy billets, when enormous contributions are levied, and atrocities committed, these things take place because governmental policy or General Staff strategy or tactics have so prescribed.²⁹⁴

Telford Taylor seems to be making similar statements concerning leadership responsibility in the Vietnamese conflict.²⁹⁵ But there seems no substitute for fact in meeting the "knew or should have known" test of criminal guilt. Taylor does add that superior equipment and mobility including command helicopters and efficient means of communication gave commanders in Vietnam a means of readily obtainable knowledge of troop conduct and a means of troop supervision and control unprecedented in earlier wars and in sharp contrast to means available to General Yamashita who was executed for the failure to supervise and control his troops.²⁹⁶

No doubt the means available for a commander in Vietnam or a leader in Washington to take effective corrective action were many, but Telford Taylor seems nowhere to provide us with facts to meet the knowledge test. Indeed, he states:

How much the President and his close advisers in the White House, Pentagon and Foggy Bottom *knew* about the volume and cause of civilian casualties in Vietnam, and the physical devastation of the countryside, is *speculative*.²⁹⁷

Concerning the My Lai massacre he states:

I am unaware of any evidence of other incidents of comparable magnitude, and the reported reaction of some of the soldiers at Son My strongly indicates that they regarded it as out of the ordinary.²⁹⁸

²⁹⁴ *Id.* at 115. The danger with this language is that it leaves out the possibility of individual action for which the commander is not liable.

²⁹⁵ See TAYLOR at 152-53, providing expressions such as "enthusiasm for body counts," and "[t]hese unlovely circumstances were not the creation of Lieut. James Duffy . . . or of the company and platoon commanders who led their men into Son My. . . . Are they alone to be held accountable?" And see *id.* at 172, "The Army leadership can hardly have been blind to the probable consequences . . .," at 175 (also at 172, talk of "certainty"), at 188 (talk of those "responsible" for the war and an "avalanche of death"), at 191 ("the Westmoreland firepower tactic"), and at 205 (major responsibility for the war and the course it took in the advisers). These are some of the examples of loose statements having, it seems, an intended effect of pointing guilt toward higher-ups.

²⁹⁶ TAYLOR at 181.

²⁹⁷ TAYLOR at 179-80 (emphasis added).

²⁹⁸ *Id.* at 139.

He also adds that the commander directives on their face, as regards the laws of war, were "virtually impeccable." But "the question remains whether the picture painted by these directives bears any resemblance to the face of the war in Vietnam. . . ." ³⁰⁰ The question, it seems, is whether any commander *knew* or *should have known* of illegal activity and failed to take reasonable corrective action as required. Until more facts are known concerning a particular commander or leader the present author is of the opinion that the facts of (1) the "impeccable" commander directives, (2) the unique nature of the My Lai massacre, (3) the investigations of all known incidents at certain levels of command, and (4) the convictions of at least sixty servicemen for murder must add strongly to a commander's defense. ³⁰⁰ This does not mean that investigations of commander conduct would be improper. In fact the Department of the Army is in the process of determining whether there is enough evidence to warrant a trial of certain commanders, ³⁰¹ or the taking of some other type of corrective measure if the facts do not warrant prosecution. Indeed, investigations of all alleged violations of the law of war should be pursued as a matter of policy; and they probably must be pursued as a matter of international law in connection with the duty of any commander or high leader to take reasonably needed corrective action once illegality is known or should be known. As we have seen, such corrective action should entail criminal investigation, enforcement of the law, and effective edu-

³⁰⁰ TAYLOR at 168. In this regard, Senator Kennedy has recently stated, "There continues to be a vast gap between the official policy of our government and the performance in the field." No direct evidence is offered. Kennedy, Press release (letter), Apr. 29, 1971.

³⁰¹ Consider also the language of *United States v. von Leeb* quoted in text accompanying note 288 *supra*. It seems that the law favors a presumption for the commander until conduct or failure is directly traceable to him (though this is possible by circumstantial evidence proving beyond a reasonable doubt). See also, *Feels no Personal Guilt, Westmoreland Asserts*, Wash. Star, Apr. 3, 1971, at 3.

³⁰² See 5 "Flagged" by Army in Viet Probe, Chicago Tribune, Apr. 22, 1971, at 5, speculating an investigation of a general and colonel (charges were later dropped, see Col. Herbert Put Under News Curb, N.Y. Times, Nov. 5, 1971, at 31); A Star Is Lost, TIME, May 31, 1971, at 13 (Major General Koster demoted, and he and his assistant division commander at My Lai, Brig. Gen. Young stripped of their Distinguished Service Medals and given letters of censure); General Sees Resor on Coverup Charge, Chicago Tribune, Apr. 10, 1971, at 2; Viet Atrocity Probe Spurred by Veterans, Wash. Post, May 5, 1971, at 22; 8 More GIs to Face Murder Charges, Wash. Post, May 3, 1971, at 5 (helicopter gunship incident); General, Ex-Aide Accused of Murdering Vietnamese, N.Y. Times, Jun. 3, 1971, at 1, col. 2. Most of the other investigations and charges were subsequently dropped.

57 MILITARY LAW REVIEW

cation and law implementation programs designed to suppress other illegal conduct.

The new Army Subject Schedule states that where a commander "fails to take reasonable steps to prevent such crimes or to punish those guilty of a violation," the commander at a minimum "is guilty of dereliction of duty."³⁰² It is further stated that if you are a commander at any level you have the duty:

to insure that all those in your command observe the law of war. You must require instruction in the law of war. You should insure that your troops know the applicable rules of engagement. You must insure that both your own orders and those of your subordinate commanders are clear and unmistakable . . . you must take positive steps to keep fully informed of what your men are doing or failing to do. . . . You should insure that your men are aware of the law of war, of their duty to disobey orders that would require them to commit acts in violation of that law, and of their obligation to report any such violation of which they become aware. . . . You should further prepare directives . . . and establish procedures . . . you must follow up . . . you must take necessary and effective corrective action.³⁰³

The requirements are not unprecedented in international law. In *United States v. List*³⁰⁴ convictions were based on the duty of a commanding general to investigate incidents and the failure "to take effective steps to prevent their execution or recurrence." It was stated that responsibility is coextensive with the area of command, that the commander must take proper corrective steps including obtaining complete information, and that where want of knowledge resulted from the failure to investigate, keep informed, and "require additional reports where inadequacy appears on their face," the commander cannot plead his own dereliction of duty as a defense.³⁰⁵

In *United States v. von Leeb*³⁰⁶ it was stated that there must be a personal command dereliction of duty as where there is a "failure to properly supervise his subordinates." A chief of staff does not become criminally responsible unless he participated in criminal orders or their execution within the command, since he has no command authority and can only call matters to the at-

³⁰² ARMY SUBJECT SCHEDULE 27-1 at 10.

³⁰³ *Id.* at 15-16.

³⁰⁴ 11 T.W.C. 757, 1256 (1948).

³⁰⁵ *Id.* at 1271.

³⁰⁶ 10 T.W.C. 1, 11 T.W.C. 543, 514.

tention of higher-ups.³⁰⁷ In *United States v. Yamashita*³⁰⁸ the U.S. Supreme Court stated that the commander had an "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." The Court also stated:

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose . . . would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.³⁰⁹

It seems little known that although the procedures used in the trial of General Yamashita were deplorable and worthy of condemnation, there were sufficient facts given to enable the board which reviewed the record of trial to conclude on the issue of command responsibility:

Upon this issue a careful reading of all the evidence impels the conclusion that it demonstrates this responsibility. In the first place the atrocities were so numerous, involved so many people, and were so widespread that accused's professional ignorance is incredible. Then, too, their manner of commission reveals a striking similarity of pattern throughout. . . . In many instances there was evidence of prearranged planning of the sites of the executions. . . . [There was] direct proof of statements by the Japanese participants that they were acting pursuant to orders of higher authorities. . . . There was some evidence in the record tending to connect accused more directly with the commission of some of the atrocities. His own Staff Judge Advocate, Colonel Hishiharu, told him that there was a large number of guerrillas in custody and not sufficient time to try them. . . . It is also noteworthy that the mistreatment of prisoners of war at Ft. McKinley occurred while accused was present in his headquarters only a few hundred yards distant. . . .³¹⁰

³⁰⁷ Query the effect of ARMY SUBJECT SCHEDULE 27-1 and the crimes of complicity or general dereliction of duty under the UCMJ. See also, U.S. DEPT OF ARMY, FIELD MANUAL 101-5, *Staff Officers' Field Manual*, para 3.47g (1966), which placed upon the staff judge advocate the responsibility to supervise the administration of war crimes matters within his command; and U.S. DEPT OF ARMY PAMPHLET 27-5, *Staff Judge Advocate Handbook*, para 40 (1963).

³⁰⁸ 327 U.S. 1, 16 (1946).

³⁰⁹ *Id.* at 15; see also *United States v. List*, 11 T.W.C. 757, 1254, 1257, stating, "Unless civilization is to give way to barbarism in the conduct of war, crime must be punished. . . . Those responsible . . . must be held to account if international law is to be anything more than an ethical code, barren of any practical coercive deterrent."

³¹⁰ *Review of the Record of Trial by a Military Commission of Tomoyuki Yamashita, General, Imperial Japanese Army*, Gen. H.Q., U.S. Army Forces,

Notice of the commission of offenses can be either actual or constructive as where such a great number of offenses occurred that a reasonable man would conclude that the commander must have known of the offenses. In the *Trial of General Matsui*³¹¹ where it was disclosed that during a six to seven week period over 100,000 people had been killed, women raped and property stolen or burned, the court said, "From his own observations and from the reports of his staff he must have been aware of what was happening. He admits he was told to some degree of misbehavior of his Army." It was also stated with regard to an issue likely to arise out of the Vietnam trials, that he "did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known and as he must have known."³¹²

In the *Trial of Kimura*³¹³ a commander knew of troop illegality but "took no disciplinary measures or other steps to prevent the commission of atrocities." He had given orders but the court stated:

The duty of an army commander in such circumstances is not discharged by the mere issue of routine orders. . . . His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.³¹⁴

In the *Trial of Hata*³¹⁵ it was disclosed that atrocities had been committed on such a large scale by troops under his command that the commander either knew of them and took no corrective action, or he was "indifferent and made no provision for learning whether orders . . . were obeyed." In the *Trial of Koiso*,³¹⁶ an ex-Prime Minister, it was stated that atrocities were so numerous that it is improbable that a man in his position would not have been well-informed. He knew that the treatment of prisoners "left much to be desired" and had asked for a full inquiry, but

Pacific, Office of the Theatre Judge Advocate, Dec. 26, 1945. See also, Wright, *Due Process and International Law*, 40 AM. J.I.L. 398, 405 (1946). Repetition of the myth that Yamashita was an innocent sacrificial lamb may be found in Falk, III THE VIETNAM WAR AND INT'L LAW, 327, 332 (1972).

³¹¹ II JUDGMENT OF THE IMT FOR THE FAR EAST 1181 (1948).

³¹² *Id.* (emphasis added).

³¹³ *Id.* at 1175.

³¹⁴ *Id.* at 1176.

³¹⁵ *Id.* at 1155. As to subordinate responsibility to initiate preventive action see *id.* at 1186, 1192.

³¹⁶ *Id.* at 1178.

he did not resign from office or act more affirmatively to stop illegal activity. He was punished for "deliberate disregard of his duty."³¹⁷

A World War I case denied liability for poor conditions of a prisoner camp under the defendant's command where he had reported conditions, made small improvements on his own, and where fault was found to exist not in him but with his superiors.³¹⁸ But responsibility is different where prisoners are mistreated or die due to the commander's dereliction in controlling his troop activity.³¹⁹ The Judgment of the International Military Tribunal for the Far East³²⁰ stated that the duty to prisoners is "not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government." Such persons "fail in this duty and become responsible" if they fail to establish a system of protection or "fail to secure its continued and efficient working." Department officials who meet the knowledge requirements as to illegal conduct and then do "nothing effective, to the extent of their powers, to prevent their occurrence in the future . . . are responsible for such future crimes."

The existence of a number of separate criminal events does not demonstrate a desired or acceptable high command or governmental policy or even a failure of high level persons to seek to implement law. However, such may demonstrate a breakdown of law and policy implementation into actual field practice and thus necessitate greater emphasis on training and precautions. And that "command failure," where it occurs, may not be criminal in nature but only a result of poor command ability.

For example, fifteen minutes of classroom instruction on the law of war would be totally insufficient to provide the unit with the guidance needed for a proper response to difficult field situations as where a patrol of five encounters fifteen wounded enemy soldiers, or where a platoon leader desires to interrogate a suspect in order to obtain information he considers vital to his unit's security. The present two hours of suggested (not consistently mandatory) classroom instruction will not even be suffi-

³¹⁷ *Id.* at 1179. See also *Trials of Shigemitsu*, *id.* at 1195, and *Togo*, *id.* at 1205.

³¹⁸ *Current Notes, German War Trials, Judgment in the Case of Emil Muller*, 16 AM. J.I.L. 628, 684 (1922).

³¹⁹ *Id.* See also *Trial of Lt. Gen. Baba Masao*, 11 L.R.T.W.C. 56, 57 (1949), citing *In re Yamashita*, 327 U.S. 1, 16; and other trials, 11 L.R.T.W.C. 59, 60 (1949), 4 L.R.T.W.C. 97, 116 (1948), and the Simpson Report, *supra* note 259 at 1 (the Malmedy massacre), 2, 8-9.

³²⁰ Vol. I, 28-32.

57 MILITARY LAW REVIEW

cient to inform each soldier what is expected of him in actual field operations. That type of law implementation can only be achieved through actual field training on the handling of detainees during sweep operations, the proper evacuation of civilians, the proper burning of selected structures, the proper use of firepower in response to sniper-fire, the proper interrogation of suspects and utilization of such procedures as map-tracking to obtain combat information, the proper treatment of enemy wounded, the individual response to illegal orders or illegal conduct, and command control of troops on sweeps through friendly villages. Without this type of training each soldier must react to situations in a different manner depending upon his fear, frustration, and individual ability to maintain a moral sense in an environment lacking proper psychic landmarks or warnings and one in which the soldier's primary thought is to stay alive. No commander can control all situations, but without proper unit training in the actual handling of detainees and prisoners the atrocities of war become more predictable—perhaps to such an extent that a conclusion of command dereliction of duty would be proper.

In Vietnam Captain Leonard Goldman was convicted of a violation of Article 92, UCMJ, for violation of directives and dereliction of duty in failing to enforce safeguards to protect female detainees in the custody of his unit under circumstances such as to afford the defendant notice of physical abuse and murder of detainees.³²¹ Many allegations relevant to command responsibility in the past or present abound.³²² But the responsibility of present leaders seems to be generally met where

³²¹ United States v. Goldman, a general court-martial convened pursuant to CMAO 7 (Jun. 29, 1968), as amended by CMAO 12 (Jul. 2, 1968), H.Q., 23D Infantry Div. (Americal), Vietnam. Findings of guilty announced Sep. 8, 1968. But a Court of Military Review subsequently reversed a dereliction of duty finding, contrary to the SJA review, as the court was not convinced "beyond a reasonable doubt" that the trier of fact was correct in concluding that the accused actually knew that a member of his unit participated in the killing (he was told, however, that a "prisoner" shot the victim). The court stated that this knowledge did not impose a duty to file a report according to military directives and that this *negligent* failure to investigate did not mandate criminal penalties under the circumstances. United States v. Goldman, 16 Sep. 1970. See U.S. DEPT OF THE ARMY PAM 27-71-17, JALS, at 6 (Sep. 1971). There was apparently no decision on the international "should have known" test of commander criminal responsibility.

³²² See, e.g., Wash. Post, Jun. 3, 1970, and *Newsweek*, May 18, 1970 (G.I. looting in Cambodia and Vietnam); Baltimore Sun, Jun. 11, 1970 (Battalion issues "Kill Cong" badges); Wash. Post, Apr. 13, 1970, and Jul. 19, 1970, and N.Y. Times, Jul. 18, 1970 (POW torture); allegations of general officer war crime responsibility in Wash. Post, Mar. 16, 1971, and Baltimore Sun, Feb. 18, 1971. See also *supra* note 301.

thorough investigation of allegations is pursued and charges are brought in cases where evidence is sufficient to merit trial, and where training programs are updated and constantly watched at high levels and field performance levels to check law implementation at troop level. An interesting statement by the Federal Republic of Germany may be relevant to present United States investigation and prosecution efforts, except in the case of the trial of ex-servicemen. The statement reads in part:

The statistics do not show 56,705 acknowledged Nazi criminals to be leading a carefree existence in the Federal Republic of Germany. What they do show, rather, is that of the approximately 75,000 persons whose alleged part in Nazi crimes has been investigated since the end of the Second World War by German or Allied prosecuting authorities, a total of 56,705 [were innocent, not proved with certainty necessary for trial, or died]. . . . The seeming discrepancy [6,227 convictions to date] is attributable to the fact that a very wide-ranging group of "suspects" had to be included in the initial investigations. . . . Furthermore, it must be noted that it is the privilege of an independent judiciary to decide cases on their merits rather than on political grounds. To increase the number of convictions because the Government wants it would be a regression to the very methods which the law courts in the Federal Republic of Germany consider a crime.¹²³

VI. CONCLUSION

What will be the ultimate result of the My Lai and other investigations is unknown. But it is certain that investigations must continue and that the country must face its own responsibilities in the years ahead. The My Lai massacre and other war crime incidents in Vietnam have shown that this nation desperately needs to carry out an effective law implementation program which will reach the lowest levels of command and troop field activity. We have already begun a good educational program, but it is hereby suggested that the Army implement a *trouble-shooting team* program whereby experienced field grade combat officers can watch over training programs so that human rights and the laws of war are effectively implemented into *all* tactical exercise training, and then that teams inspect actual combat situations to make sure that training does not break down in the field. It is further suggested that ways be sought to actively implement international supervisory efforts into United States force activities beyond inspection of prisoner of war camps

¹²³ Reply of the Federal Republic of Germany, Jul. 9, 1970, to the U.N. Secretary General, reported in U.N. Doc. A/8038 (1970), *supra* note 101 at 6, 13.

57 MILITARY LAW REVIEW

themselves; that Congress actively seek to prevent United States assistance to countries which do not themselves follow the laws of war; that rapid efforts be made to establish independent protecting powers at the international level with the power to inspect, protect detainees, and set up population safety zones wherein neither the guerrilla-insurgent nor the other powers can carry on military operations; and that an international commission for the protection of human rights in war be established under the leadership of this administration.

This country must also lead the way in establishing workable rules of engagement for air and helicopter commanders. We must establish an effective, uniform and consistent law enforcement program not because we wish to punish but because we know that without enforcement there may be no law in the field. Our aim now is to implement international law into an effective preventive law program. Additionally, it is suggested that the United States propose and initiate a program for an individual right of action to recover damages or other compensatory relief in domestic courts. Governmental claims services are not always existent and do not always provide sufficient compensation to the victims of war. Furthermore, the international legal process does not afford the individual a proper opportunity for personal involvement in law creation. It is the view of the author that the creation of individual rights of action is critical to effective law implementation. We cannot allow the system to remain aloof from the human values and experiences that personal involvement or input into the law process could provide. Such a program of individual rights could be recognized and implemented by international agreement so as to afford access to domestic courts and a general review procedure whereby an international supervisory commission could receive government reports of action and progress and also receive individual petitions for consideration and recommendation. Somehow we must get individual input into the legal process. By allowing individual rights of action we could finally provide some meaning to the principle recognized in the 1948 Universal Declaration of Human Rights that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by law.³²⁴

³²⁴ Universal Declaration of Human Rights, G.A. Res. 217, 3 GAOR, U.N. Doc. A/810, at 71 (1948), article 8. Note that the Hague Convention IV (1907), article 3, and the Geneva Civilian Convention (1949), article 29, establish a duty or state responsibility concerning the need for reparations, but in IV PICTET, at 209-211, it is evident that the state duty to make rep-

WAR CRIMES

This war has, more than any other, lessened the spirit and conscience of America. Human conscience is a key to human rights implementation and we have allowed ourselves to become the victims of our own apathy. Not only in this country but around the world we need a revolution of conscience and cooperative concern for problems which affect us all.

aration for injury suffered is to be enforced on a state basis and that the Geneva Convention drafters did not intend to grant a direct individual right of action. Cf. private causes of action in tort for violations of the law of nations recognized and implemented under federal court jurisdiction in 1 Stat. 73, 77 (1789). Was there a prior historic basis for individual causes of action subsequently neglected? To implement article 8 of the Universal Declaration of Human Rights it would seem necessary for the community to guarantee an individual right of action in the domestic courts of each nation signatory for the national of all signatory nations and for other persons protected in the Conventions. It would also seem necessary to provide for a system of review by an international commission (not necessarily a new organ). The reader should also note that the 1966 International Covenant on Civil and Political Rights, *supra* note 158, article 2, does not seem to guarantee an individual right of action in domestic courts for damages, but only the assurance by a nation signatory that certain individuals shall have an "effective remedy" through action of a "competent authority." Furthermore, the Covenant system of review in articles 40-42 is based on a system of state reports and committee comments and provides an optional "tattletale" procedure, but nowhere provides for an unequivocal right of individual petition (not even the Optional Protocol, *supra* note 158, provides an unequivocal right of individual petition). A Protocol to the 1949 Geneva Conventions would be a useful vehicle for the implementation of the human right to compensatory relief, and could cover more persons since the Covenant seems to be limited to assuring protection only to persons within the territory of a signatory nation and persons subject to its jurisdiction. It does not seem that article 2 of the Covenant specifically covers the persons most likely to be subject to injury in case of an international armed conflict, i.e., those persons who are not subject to the jurisdiction of nor in the territory of the offending state (though undoubtedly such persons fall within the other articles of the Covenant referring to "all persons," "every human being," "no one," etc.). A remedy to the problem is hereby suggested in the form of a Protocol to the 1949 Geneva Conventions:

Each High Contracting Party undertakes to enact any legislation necessary to provide effective judicial remedies for any person protected by the Conventions. In all circumstances the individual right to effective relief and compensation for infringement of his rights under the Conventions shall be respected, implemented, and protected by each High Contracting Party.

Any violation of any article of the Geneva Conventions which results in direct injury to a person protected under the Conventions can constitute the basis for an individual cause of action as guaranteed here by the High Contracting Parties. The cause of action can be against another individual, group, organization or against the state itself. The individual right of action shall not affect any other liability which an individual, group, organization or High Contracting Party incurs. Furthermore, if an individual has exhausted procedures implemented under the present Protocol he may petition appropriate international bodies for relief or action.

RECENT DEVELOPMENTS

The Law of Speedy Trial: *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166; *United States v. Hubbard*, 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971)*

I. INTRODUCTION

The Sixth Amendment's guarantee of the right to speedy trial is reiterated for the benefit of persons pending court-martial charges in Article 10¹ and 33² of the Uniform Code of Military Justice³ (UCMJ). During the decade and a half since its first considerations of these provisions,⁴ the Court of Military Appeals has often been asked to delineate circumstances which constitute a denial of speedy trial. Until recently, the Court had refused to set precise guidelines, preferring to decide each case by applying rather vague standards to the case's particular facts and circumstances.⁵ In December of 1971, however, the Court

*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any governmental agency.

¹Article 10, UNIFORM CODE OF MILITARY JUSTICE [hereinafter referred to as Article 10], which provides impertinent part: "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

²Article 33, UNIFORM CODE OF MILITARY JUSTICE [hereinafter referred to as Article 33], provides: "When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay."

³*United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956); see also, Article 30(b), UNIFORM CODE OF MILITARY JUSTICE, which provides: "Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable."

⁴*United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

⁵*United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969); Tichenor, *The Accused's Right to a Speedy Trial in Military Law*, 52 MIL. L. REV. 1, 28 (1971) [hereinafter referred to as Tichenor]. Maj. Tichenor's article provides an excellent general discussion of all aspects of the law of speedy trial in the military.

Generally, consideration of speedy trial has been said to have special significance in the military since "there is no provision in military law that adequately provides for release before trial," *United States v. Mladjen*, 19

57 MILITARY LAW REVIEW

decided two cases which promise to make future speedy trial violations more easily definable.

Each case was ostensibly but another in a long line of predictably unpredictable applications of the law of speedy trial. Yet each assumed special significance: *United States v. Hubbard*⁶ because it apparently signaled a retreat from the view that prejudice to the accused is an indispensable element of a denial of speedy trial, and *United States v. Burton*⁷ because it promulgated new, more easily applicable guidelines for determining the speedy trial issue. Together, *Burton* and *Hubbard* could have great impact on the law of speedy trial.

II. THE HUBBARD HOLDING

Leroy Hubbard was convicted by general court-martial for unauthorized absence.⁸ His motion to dismiss for lack of speedy trial under Articles 10 and 33 was denied by the trial judge. On appeal, the Court of Military Appeals viewed the facts surrounding accused's 134-day pretrial confinement.⁹ On April 3, FBI agents apprehended the accused in Richmond, Virginia, and had him confined in the Hanover County Jail. Military authorities were notified; however, apparently through their own negligence, they took no action in the matter until notified a second time 47 days later. Accused had remained confined during this period. Ten days after they were notified the second time, guards arrived to escort the accused to the military stockade facility at Quantico, 75 miles away. Charges were not preferred until approximately two months later and trial was had on August 31. The Court held that both Articles 10 and 33 had been violated, noting "there was 'total inactivity' on the part of the Government for forty seven days after accused's confinement; and during the next ten days, the Government merely moved the accused from the civilian jail to the confinement facility at Quantico."¹⁰ Since there was no satisfactory explanation for the Government's inaction, the accused was denied his right to speedy trial. Judge Quinn, writing for the majority, considered the Government's contention that the remedy should not be dis-

U.S.C.M.A. 159, 163, 41 C.M.R. 159, 163 (1969) (concurring opinion of Ferguson, J.), and since "the time of enlistment is extended by the period of pretrial confinement," *United States v. Wilson*, 10 U.S.C.M.A. 337, 340, 27 C.M.R. 411, 414 (1959).

⁶ 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971).

⁷ 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971).

⁸ Article 86, UNIFORM CODE OF MILITARY JUSTICE.

⁹ *United States v. Hubbard*, 21 U.S.C.M.A. 131, 44 C.M.R. 185 (1971).

¹⁰ *Id.*, at 132, 44 C.M.R. at 186.

RECENT DEVELOPMENT

missal since the trial judge noted that he had considered the delays in determining the sentence. Holding that the charges should be dismissed, he said: "Congress, however, did not provide for expiation of a violation of Article 10 by credit for illegal pretrial confinement. Rather it directed that if timely steps are not taken to try an accused in pretrial confinement the relief to which he is entitled is to 'dismiss the charges and release him'." ¹¹

In dissent, Chief Judge Darden thought recent cases supported the principal that violations of Article 10 must be tested for prejudice. He particularly cited *United States v. Marin*,¹² the most recent case on speedy trial prior to *Burton* and *Hubbard*, in which he wrote for the majority. "I consider *Marin* little different from this case. *Marin*, like *Hubbard*, suffered no harm in the preparation of his defense. Both records reflect compensatory sentencing action." ¹³ Judge Darden concluded with the following paragraph:

Although compensatory sentencing action does not excuse the failure of officials at Quantico to follow up their being notified that Hubbard was in jail and to remove him to Quantico, I still believe that dismissal of charges is a drastic and unsatisfactory remedy. . . . It frees offenders against military law but it does not punish those responsible for the delay. When no prejudice other than the pretrial confinement itself results, and when a military judge declares that he is crediting pretrial confinement against the confinement he otherwise would adjudge, this impresses me as being a satisfactory intermediate remedy. Accordingly, I would affirm decision. . . ."

As Judge Darden pointed out, discussion of "prejudice" is conspicuous by its absence from the *Hubbard* majority opinion. In order properly to assess the significance of this omission, it would be appropriate to review briefly the history of the element of prejudice in speedy trial cases.

Typically, both Federal and State courts have been concerned with two elements in determining speedy trial violations: lack of diligence in prosecution and specific prejudice to the accused resulting from the lack of diligence.¹⁴ While all courts have agreed that a non-diligent delay resulting in actual prejudice—some specific harm to the accused other than the mere length of the

¹¹ *Id.*, at 133, 134, 44 C.M.R. 25, 26.

¹² 20 U.S.C.M.A. 432, 43 C.M.R. 272 (1971).

¹³ *United States v. Hubbard*, 21 U.S.C.M.A. 131, 134, 44 C.M.R. 185, 188, (1971).

¹⁴ *Id.*

¹⁵ Comment, *Constitutional Right to a Speedy Trial: The Element of Prejudice and the Burden of Proof*, 44 TEMPLE L.Q. 310 (1971).

delay—violates the right to speedy trial, there have been differing opinions as to whether a specific showing of prejudice is necessary to prove a denial of the right.¹⁶ In other words, there has been confusion as to the significance of a non-diligent yet non-prejudicial delay.

The view of the United States Supreme Court is that actual prejudice must be shown.¹⁷ The most recent case touching the issue, *United States v. Marion*,¹⁸ considered the question of whether the Sixth Amendment right applied to a pre-indictment delay. The Court held that it did not.¹⁹ Mr. Justice Douglas, joined by Justices Marshall and Brennan, concurred in the result, but argued that the Sixth Amendment speedy trial guarantee should apply to pre-indictment delays.²⁰ However, he concluded that the case should still be remanded and, "unless appellees on remand demonstrate actual prejudice," the prosecution should be allowed to proceed.²¹

When discussing the element of prejudice as applied by the Court of Military Appeals, it is important to note that Articles 10 and 33, while reiterating the Sixth Amendment right to speedy trial, also provide certain specific requirements applicable only in the military. Immediate steps must be taken to inform the accused of the charges against him,²² and a report must be made to the general court-martial convening authority as to the reasons for any delay of more than 8 days between arrest and confinement and the forwarding of charges.²³ Speedy trial cases in the military are often concerned with violations of these specific requirements in addition to violation of the basic right to speedy disposition of the charges.

The first speedy trial cases decided by the Court of Military Appeals never reached the prejudice issue because it was determined that the Government had met its burden of showing reas-

¹⁶ *Id.* at 311.

¹⁷ *Id.* at 314. See, *Dickey v. Florida*, 398 U.S. 30 (1970), *Smith v. Hoey*, 393 U.S. 374 (1969), *Klopfer v. North Carolina*, 386 U.S. 213 (1967), *Ewell v. United States*, 383 U.S. 116 (1966).

¹⁸ *United States v. Marion*, U.S. , 30 L ed. 2d 468 (1971).

¹⁹ *Id.* at , 30 L ed. 2d at 481.

²⁰ *Id.* at , 30 L ed 2d at 482.

²¹ *Id.* at , 30 L ed 2d at 487.

²² Article 10, see also Article 30b, *UNIFORM CODE OF MILITARY JUSTICE*.

²³ Article 33.

RECENT DEVELOPMENTS

onable diligence.²⁴ However, in *United States v. Wilson*,²⁵ by finding no delay which had been "prejudicial to the rights of the accused,"²⁶ the court hinted that actual prejudice might not be necessary. Apparently, the delay itself, without actual prejudice, could be enough to warrant dismissal of the charges.

In *United States v. Snook*,²⁷ the accused alleged actual prejudice in that certain witnesses had become unavailable, but the Court held this contention to be ill-founded. Nonetheless, *Snook* was significant in that the cases following it suddenly began to concern themselves with prejudice.²⁸ Since that time the court has found several violations of Articles 10 and 33, and until the case of *United States v. Pierce*,²⁹ they were easily categorized with regard to prejudice. Where there were violations of the "specific requirements" provisions of the UCMJ, the charges would not be dismissed unless actual prejudice was shown.³⁰ On the other hand, where there was a finding that the delay in proceeding to trial was unreasonable, there was no need for such a

²⁴ *United States v. Williams*, 12 U.S.C.M.A. 81, 30 C.M.R. 81 (1961); *United States v. Batson*, 12 U.S.C.M.A. 48, 30 C.M.R. 48 (1960); *United States v. Davis*, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960); *United States v. Wilson*, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959); *United States v. Wilson*, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959); *United States v. Callahan*, 10 U.S.C.M.A. 156, 27 C.M.R. 230 (1959). For a recent case in which the Court did not reach the prejudice issue because of a finding of reasonable diligence, see *United States v. Ray*, 2 U.S.C.M.A. 331, 43 C.M.R. 171 (1971).

²⁵ 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959).

²⁶ 10 U.S.C.M.A. at 401, 27 C.M.R. at 475.

²⁷ 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962).

²⁸ See e.g., *United States v. Parish*, 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1968); *United States v. Broy*, 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964); *United States v. Brown*, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962).

²⁹ 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).

³⁰ *United States v. Mladjen*, 19 U.S.C.M.A. 159, 41 C.M.R. 159 (1969); *United States v. Przybycien*, 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969); *United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969); *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965). In *Mladjen*, *Przybycien*, and *Hawes*, the Court first found no violation of speedy trial in that the Government used reasonable diligence in its prosecution. Then, the Court either found or assumed for the sake of argument a violation of a specific questions of Articles 10 and 33, refusing to dismiss the charges after finding no prejudice. Similarly, the Court has held that while an agreement not to contest a case on the grounds of denial of speedy trial is void as against public policy, *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968), such an agreement would not result in dismissal of charges unless prejudice was shown. See *United States v. Curtis*, 17 U.S.C.M.A. 478, 38 C.M.R. 276 (1968); *United States v. Dyer*, 17 U.S.C.M.A. 475, 38 C.M.R. 273 (1968); *United States v. DeShazo*, 17 U.S.C.M.A. 472, 38 C.M.R. 270 (1968); *United States v. Lance*, 17 U.S.C.M.A. 470, 38 C.M.R. 269 (1968); *United States v. Pratt*, 17 U.S.C.M.A. 464, 38 C.M.R. 262 (1968).

showing, since the delay was prejudicial in itself.¹¹ Thus, in the latter group of cases, the charges would be dismissed without a showing of some specific harm to the accused.

The *Pierce* decision, followed closely by *Marin*, seemed to reverse this position. The Court in *Pierce* dealt with a 13-month delay during which the accused was tried and convicted of a civilian offense. There was no explanation for the delay; however, said the Court, "even if there were a prima facie violation of Article 10 in this case, the accused was not harmed because of the delay in his military trial." The Court concluded that "the delay was perhaps beneficial to the accused." Although the Court was concerned with Article 10's basic requirement of speedy trial as opposed to its specific requirements, the test of prejudice became a necessary one.

In *Marin*, the majority conceded that there was a possible violation of Article 10, in that there was no explanation made by the Government for a 57-day delay between apprehension and return to the military post, and a 21-day delay in forwarding the charges. Nonetheless, the Court noted that the delays did not hinder the appellant in the preparation or presentation of his case. Also, it was noted that the military judge considered the delays in prosecution when determining his sentence. "Since the delays that occurred here did not handicap the appellant in preparing his defense, and since the military judge considered the length of pretrial confinement in deciding an appropriate sentence, we affirm the decision. . . ." ¹² Senior Judge Ferguson, who concurred in *Hubbard*, dissented in *Marin*, in an opinion which reads much like *Hubbard's* majority.¹³ He pointed out that the extraordinary remedy of reversal of conviction and dismissal was the only available solution for violations of Article 10 and

¹¹ *United States v. Keaton*, 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969); *United States v. Weisenmuller*, 17 U.S.C.M.A. 636, 38 C.M.R. 434 (1968). See also, *United States v. Williams*, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967), where instead of characterizing the delay as prejudicial in itself, Judge Ferguson, speaking for the Court, concluded that the "[the] accused was denied military due process and his right to the speedy disposition of the charges against him." While *Williams* is the only military case involving delay in trial which turns on due process as well as speedy trial issues, the Court has stated that the issues of speedy trial and the denial of due process frequently are inextricably bound together and the line of demarcation is not always clear. *United States v. Schalek*, 14 U.S.C.M.A. 371, 373, 34 C.M.R. 151, 153 (1964). See also *United States v. Marion*, U.S. , 30 L ed 2d 468 (1971); *United States v. Werthman*, 5 U.S.C.M.A. 440, 18 C.M.R. 64 (1955); and *Tichenor*, at 5.

¹² *United States v. Marin*, 20 U.S.C.M.A. 432, 435, 43 C.M.R. 272, 275 (1971).

¹³ *Id.*

RECENT DEVELOPMENTS

33, and, therefore, the Government's failure to render an explanation for prima facie inordinate delays necessitated dismissal of the charges for lack of speedy trial.³⁴

In *Hubbard*, the charges were dismissed for just such a lack of explanation. Since the case dealt with speedy trial in general as well as violations of the "specific requirements" of the UCMJ, it indicated a retreat from the holdings of *Pierce* and *Marin*. While a failure to inform the accused of the charges or report to the convening authority concerning inordinate delays will likely still be subject to the test of prejudice, it appears that in the future an unreasonable delay in prosecution standing alone will be enough for dismissal.³⁵ Of course, it would be possible to distinguish *Hubbard* on the basis that it was, like *United States v. Williams*,³⁶ decided on due process rather than statutory speedy trial grounds or that there was actual prejudice which can be implied from the circumstances and length of the delay.³⁷ If such be the case, prejudice might once again become a factor in determining speedy trial questions, and delays which otherwise do not indicate reasonable diligence might not, as in *Pierce* and *Marin*, be enough to warrant dismissal in the absence of prejudice. But unless and until *Hubbard* is so interpreted, it appears that a large stumbling block which had been placed in the way of an accused's claim of lack of speedy trial has been removed.³⁸

³⁴ *Id.*

³⁵ It should be noted that prejudice is, regardless of *Hubbard*, still an element which can effect the outcome of a speedy trial question if raised by the defense or if inferred as a result of the delay. *Hubbard* merely indicates that lack of prejudice will not prohibit a finding of a speedy trial violation. See *United States v. Smith*, 17 U.S.C.M.A. 55, 58, 37 C.M.R. 319, 322 (1967), where the court said: "An apparently satisfactory explanation for a particular delay might be revealed as unreasonable in light of specific harm to the accused occasioned by the delay."

³⁶ 16 U.S.C.M.A. 189, 37 C.M.R. 209 (1967). See footnote 31, *supra*.

³⁷ In this connection, it might be appropriate to consider the fact that Judge Ferguson who concurred in *Hubbard*, has retired from the Court. Throughout the history of speedy trial decisions, Judge Ferguson consistently has been opposed to the application of the test of prejudice to any violation of Articles 10 or 33, including the specific requirements. See, e.g. his concurring opinion in *United States v. Mladjen*, 19 U.S.C.M.A. 159, 163, 41 C.M.R. 159, 163 (1969), and his dissenting opinion in *United States v. Przybycyn*, 19 U.S.C.M.A. 120, 122, 41 C.M.R. 120, 122 (1969). His absence from the Court may well result in a reassessment of the *Hubbard* decision.

³⁸ It is interesting to note a similar retreat from the necessity of showing prejudice in the cases which deal with post-trial delays in the appellate process. Based on the decision of *United States v. Richmond*, 11 U.S.C.M.A. 142, 28 C.M.R. 366 (1960), the Court, with Judge Ferguson dissenting in principle each time, held in a series of three decisions that an unexcused appel-

III. THE BURTON HOLDING

In late 1969, Specialist 4 Larry A. Burton was convicted by general court-martial of two specifications of assault and one of violating a general regulation.³⁹ The Court of Military Appeals granted review, one of the issues being whether Burton was denied his right to a speedy trial.⁴⁰

The offenses were allegedly committed in Vietnam on December 20, 1968. Burton was charged and placed in confinement at Fort Dix, New Jersey, on May 9, 1969, and the Article 32 investigating officer received the case on May 14. Attempts to locate witnesses followed, and when it was determined that they were still in Vietnam, the Article 32 hearing was held on June 4. Despite attempts both before and after the hearing to secure the directive issued by United States Army, Vietnam which Burton allegedly violated, the investigating officer did not receive copies thereof until July 3, 1969. On July 11, the investigation file was returned to the investigating officer in order that he might insert a chronology of the events of the proceedings. The file was forwarded to Burton's unit on July 17, and sent to the Staff Judge Advocate on July 28. On August 8, it was returned to the unit for correction of the charges and forwarded to the SJA a second time on August 16. The convening authority ordered the case tried by general court-martial on August 21, and it was referred to trial on September 2, 1969. Trial commenced on October 7,

late delay must still be subjected to the test of prejudice. *United States v. Davis*, 20 U.S.C.M.A. 541, 43 C.M.R. 381 (1971); *United States v. Prater*, 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971); *United States v. Ervin*, 20 U.S.C.M.A. 97, 42 C.M.R. 289 (1970). The recent case of *United States v. Adame*, 20 U.S.C.M.A. 573, 44 C.M.R. 3 (1971), however apparently reverses that position. With Chief Judge Quinn writing the majority opinion and Judge Darden dissenting, the Court, without discussing prejudice, dismissed the charges where there was a delay over a year in the appellate process. Judge Darden's dissent pointed to the fact that there was no harm to the accused, and suggested that a rehearing would be more appropriate than dismissal. A comparison of this case with the *Ervin* decision shows that while both cases ostensibly turned on the fact that there would be no useful purpose in continuing the proceedings, the real difference was the question of prejudice, as evidenced by Judge Darden's dissent. As in *Marin* and *Hubbard*, Judge Quinn has evidently swung over to the side of the departed Judge Ferguson on the question of prejudice. See also *United States v. Sanders*, 20 U.S.C.M.A. 580, 44 C.M.R. 10 (1971). (But see *United States v. Mohr*, 21 U.S.C.M.A. 360, 45 C.M.R. 134 (No. 24, 354, 1972), decided after the completion of this comment, which holds that prejudice is the dispositive issue in this area.)

³⁹ Articles 92 and 128, UNIFORM CODE OF MILITARY JUSTICE.

⁴⁰ — U.S.C.M.A. —, 43 C.M.R. 413 (1971), reported below as *United States v. Burton*, 43 C.M.R. 732 (ACMR 1971).

RECENT DEVELOPMENTS

and, due to continuances, was not completed until November 21, 1969.

Chief Judge Darden, writing for the majority, was primarily concerned with the period from July 3 to September 2. Conceding that "the progress [during that period] was not fast," he found that "it was not so slow as to indicate either gross negligence or callous indifference."⁴¹ He pointed to the amendment of the charges as one indication that the Government was proceeding with the case. As to the period prior to July 3, spent waiting for the directive, Judge Darden recognized that the Manual requires that all charges against an accused to be tried at a single trial, with the exception that minor offenses should not be joined with serious offenses. Since the directive Burton allegedly violated concerned possession of an unauthorized weapon, the dereliction was not minor, and the period waiting for the directive was justified.

Having determined the reasons for the delay, the Court then considered the question of prejudice.⁴² According to Judge Darden, prejudice can result if the pretrial confinement is so long or otherwise tainted as to be prejudicial *per se* or to raise a presumption of prejudice, or, if this is not the case, is specifically alleged by the accused. Here, he pointed out, the accused chose to allege specific prejudice in that "(1) the psychiatrist and the psychologist who examined the appellant were hindered in their diagnoses because of the delay; (2) the witnesses were unavailable until the actual trial; and (3) a change in the appellant's trial defense counsel was required."⁴³ The court answered each of these allegations, concluding that none actually prejudiced the accused, and, therefore, that the Government had borne its burden of proving that the delay was not unreasonable:

After hearing all the evidence the military judge commented on the "several periods of inactivity for which no one should be happy," but concluded that the Government moved "within reasonably diligent limits." Making some allowance for the complications resulting from trial in the United States for offenses committed overseas, we find that the judge's determination was not so unreasonable as to require reversal.⁴⁴

⁴¹ United States v. Burton, 21 U.S.C.M.A. 112, 116, 44 C.M.R. 166, 170 (1971).

⁴² As pointed out earlier in the discussion of *Hubbard*, prejudice remains a valid consideration in determining reasonable diligence, although it is apparently no longer a necessary element for showing lack of speedy trial. See text at footnote 16 *supra*, text at footnote 51 *infra*.

⁴³ *Id.*

⁴⁴ *Id.* at 117, 44 C.M.R. at 171.

57 MILITARY LAW REVIEW

Following this holding, the Court turned to another aspect of the case with which it was "deeply concerned": while on three occasions beginning June 2 the defense counsel moved for prompt disposition of charges, no response to these motions was ever received. Although characterizing this failure to respond as a "neglect of duty" and "inexcusable", the Court decided that such failure could only be construed as a denial of the motion, and, in light of its earlier acquiescence in the trial judge's determination of reasonable diligence, such denial was reasonable. Thus no relief could be granted.⁴³

In discussing the area of prompt disposition of charges, the Court said that once a prompt trial is urged, "the Government is on notice that delays from that point forward are subject to close scrutiny and must be abundantly justified."⁴⁴ Whether this alters the weight of the Government's burden of proof at trial is not clear, but apparently, notwithstanding the fact that it based its ultimate holding on the somewhat negative finding that the trial judge's determination "was not so unreasonable as to require reversal," the Court felt the delay in *Burton* had been "abundantly justified."

Finally, the Court looked to the future. Appellate defense counsel had asked the Court to formulate new guidelines for determining the question of speedy trial, and the Court responded in two ways. First, it said, for offenses occurring after the date of the opinion, pretrial confinement of more than three months will result in a presumption of a violation of Article 10. This presumption will place a heavy burden on the Government to show diligence, the absence of which will result in dismissal of the charges.⁴⁵ Second, the Court spoke of the situation where the defense moves for prompt disposition of the charges. The Government must, said the Court, make a response to such a request and then either proceed immediately or show adequate cause for further delay. Failing to respond or proceed to trial might justify extraordinary relief.⁴⁶ As authority for this possibility, the Court cites *Petition of Provoo*,⁴⁷ a Federal case holding that dismissal of charges is a proper remedy for failure to act on a motion to go to trial.

The substantive holding of *Burton* is a rather good statement of the law of speedy trial as it would apply to offenses committed

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 118, 44 C.M.R. at 172.

⁴⁶ *Id.*

⁴⁷ 17 FRD 183, 200 (1955), *affirmed*, 350 U.S. 857 (1955).

RECENT DEVELOPMENTS

prior to the date of its holding. The court pointed out that in determining reasonable diligence, several factors may be considered, including the length of the delay, the reasons for the delay, prejudice to the accused, and whether the accused has waived his rights.⁵⁰ It then considered these factors in determining that it could not overturn the trial judge's finding of reasonable diligence. Despite the lengthy discussion of prejudice in *Burton*, there is nothing therein which conflicts with the significance of the *Hubbard* holding, handed down the same day. In *Burton*, the existence of or lack of prejudice was merely one of the factors considered in determining reasonable diligence. The significance of *Hubbard*, on the other hand, is that, in spite of a lack of prejudice, charges may be dismissed where there is otherwise an unreasonable delay. *Burton* did not say that *in spite of an unreasonable delay* the conviction would stand because the accused had not been prejudiced. It did say, however, that prejudice is always a relevant consideration in determining whether there has been an unreasonable delay.⁵¹

Two other important areas of the law of speedy trial are touched peripherally by the *Burton* denial: burden of proof and waiver. While there is no comment on burden of proof, other than to say, as noted, that delays following the urging of prompt trial by the defense must be "abundantly justified," it is the sense of the opinion that the burden of showing that the accused was not denied his right to a speedy trial is on the Government. The question of waiver, when viewed in the light of recent cases, has ceased to be one of major importance.⁵² Nonetheless, the Court apparently still recognizes its viability, since it points out that a motion for prompt disposition of the charges by the defense serves as an avoidance of "what could otherwise be a waiver of the speedy trial issue."⁵³

The guidelines, not the substantive holding, are the heart of the *Burton* decision. Throughout its history, the Court of Military Appeals has had occasion to interpret the Manual for Courts-Martial and also to make rules where the Manual is silent.⁵⁴ Often, the Court will turn to federal court practices or federal decisions as guides. In the case of speedy trial guidelines however, there is

⁵⁰ *United States v. Burton*, 21 U.S.C.M.A. 112, 117, 44 C.M.R. 166, 171, (1971).

⁵¹ See note 35, *supra*.

⁵² Tichenor, at 42.

⁵³ *United States v. Burton*, 21 U.S.C.M.A. 112, 117, 44 C.M.R. 121, (1971).

⁵⁴ See the discussion of this point in Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 84 (1972).

as yet nothing in the Federal Rules of Criminal Procedure which sets forth hard and fast standards.⁵³ The *Burton* court thus looked to *United States v. Hounshell*, which reviewed the legislative history of Article 10, and concluded that "Congress had not adopted the practice of some 'States under which an accused is automatically discharged if he is not brought to trial within a specified time after being charged. That history remains unchanged.'" For that reason said the Court, "we are hesitant to apply rigid time limits."⁵⁴ Thus, the Court was left with the task of devising its own rules. In so doing, it arrived at the guidelines mentioned previously.

Other jurisdictions, Federal and State, faced with ever increasing numbers of cases and pretrial confinees, have also turned to rules defining speedy trial. For example, the Second Circuit Court of Appeals promulgated rules for its district courts which went into effect July 5, 1971.⁵⁵ In effect, these rules provide that in the absence of defense delay, the Government must be ready for trial within 90 days from the date of pretrial confinement or six months from the date of arrest if there is no confinement. In the event the Government is not ready within 90 days and the defendant is incarcerated, the defendant must be released. If the Government is not ready for trial within six months, the charges will be dismissed. Additionally, the Judicial Conference of the State of New York has adopted similar rules for the state's criminal courts which became effective May 1, 1972.⁵⁶

It should be noted that both the Second Circuit and New York rules, rather than providing a presumption, provide for automatic release and/or dismissal of the charges.⁶⁰ As stated earlier,

⁵³ An amendment to Rule 50, effective October 1, 1972, has been ordered by the Supreme Court. Under its terms each district court will be required to devise a plan "for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place." Amendments to Federal Rules of Criminal Procedure, 40 U.S.L.W. 4467, 4472 (1972).

⁵⁴ 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

⁵⁵ *United States v. Burton*, 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172, (1971).

⁵⁶ Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Appendix, 28 U.S.C.A. (Supp. 1971). The rules were announced in *United States ex rel Frizer v. McManns*, 437 F. 2d 1312 (2d Cir. 1971). See also Comment, *Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 COLUM. L. REV. 1059 (1971).

⁶⁰ New York Rules Governing Release From Custody and Dismissal of Prosecution, 29.1-29.7.

⁶¹ Section 1382 of the CALIFORNIA PENAL CODE, as amended in 1959, provides for the dismissal of an indictment or information if the defendant has not been brought to trial within 60 days. The dismissal is not automatic, however, the accused being required to take various steps to assert his

RECENT DEVELOPMENTS

the Court of Military Appeals has indicated it is not prepared to apply such rigid time limits.⁶¹ Nonetheless, a comparison of the *Burton* rules with those of New York and the Second Circuit shows that in practice they should prove similar. While the military defendant will not automatically be released after three months, he can, after that time, make a request for a trial, thus forcing the Government to bring him to trial, explain adequately the delay, or dismiss the charges. Additionally, the *Burton* provision allowing the accused to force the government to trial applies to all accused, regardless of pretrial confinement. This, as with the Second Circuit and New York rules, both confined and nonconfined accused may benefit from the new guidelines.

Perhaps the most crucial provision of the *Burton* guidelines is that placing a "heavy burden" on the Government to show diligence. Just what this means is not clear, and the way in which the phrase is interpreted will be of the greatest significance in determining whether these guidelines have any effect on future speedy trial issues. Prior to *Burton*, the Government was required to prove speedy trial by a preponderance of the evidence.⁶² The *Burton* Court's discussion of motions for prompt disposition of charges intimated that once such a motion is made the burden of proof becomes heavier, in that any delay must be "abundantly justified." There appear, then, to be three burdens for proving diligence. First, in the case where there is pretrial confinement of less than three months or no pretrial confinement absent a request for prompt disposition of charges, the Government will be required to bear the same burden it had before *Burton*: to prove speedy trial by a preponderance of the evidence. Secondly, where the accused is not confined and makes a request to go to trial, delay after the request must be explained by "adequate cause," which apparently refers to the "abundantly justified" standard set forth earlier in *Burton*. Apparently, the "abundantly justified" test would also apply in a situation where a pretrial confinee of less than three months (who is therefore not entitled to a presumption of an Article 10 violation) requests a speedy disposi-

rights in a timely manner. For discussion see the California Superior Court Judge's Manual.

⁶¹ One reason for this might be that the problem with increased caseloads and long pretrial confinements is apparently not so severe in the military, or at least in the Army, as it is in other jurisdictions. See Comment, *Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 COLUM. L. REV. 1059, 1060 (1971), for discussion of the problem in the Second Circuit, and 2 THE ARMY LAWYER 8 (March 1972) for Army statistics.

⁶² MANUAL FOR COURTS-MARTIAL, 1969 (REV.), para 67e.

tion of the charges and then is subjected to further delay. Finally, there is the "heavy burden" which the Government must bear given more than three months of pretrial confinement. It would seem natural that these three burdens should be weighted with the "preponderance" test being the lightest, the "heavy burden" as a result of three months confinement being the heaviest, and the "abundantly justified" test falling somewhere in the middle. However, just as many factors have influenced speedy trial determinations prior to *Burton*, these same factors are likely to effect the burdens of proof set forth by the decision.

In determining what the Government should attempt to prove in rebutting the presumption of an Article 10 violation after three months' confinement, the *Hubbard* case and its future interpretation could come into play. If prejudice is no longer an element of denial of speedy trial, then a Government showing that the accused was not prejudiced will serve only to emphasize the Government's diligence. However, if *Hubbard* is distinguished, the Government might find that it will often be advantageous to prove that the accused has not been prejudiced. Since the presumption of an Article 10 violation would be a presumption of (1) non-diligent delay and (2) prejudice to the accused, the Government, if unable to rebut lack of due diligence, could still win if it could rebut prejudice. The *Pierce*⁴³ decision, noted earlier when discussing *Hubbard*, might shed some light on the weight of such a burden. In *Pierce*, the Court said that even given a *prima facie* violation of Article 10, the Government had shown certain circumstances which showed that there was no prejudice. Overcoming a *prima facie* violation is not unlike rebutting a presumption. It is submitted that if prejudice remains an element of lack of speedy trial, an actual showing by the Government of lack of prejudice will be necessary as in *Pierce*, as opposed to merely noting that there is nothing in the record from which prejudice or lack of prejudice could be concluded.⁴⁴

The concept of waiver has become a key factor once again, since the *Burton* guideline provides that defense requests for continuance will result in the postponement of the existence of a presumption of lack of speedy trial for as long a period of time

⁴³ 19 U.S.C.M.A. 225, 41 C.M.R. 225 (1970).

⁴⁴ See, e.g., *United States v. Marin*, 20 U.S.C.M.A. 432, 43 C.M.R. 272 (1971); *United States v. Mladjen*, 19 U.S.C.M.A. 159, 41 C.M.R. 159 (1969); *United States v. Przybycien*, 19 U.S.C.M.A. 120, 41 C.M.R. 120 (1969); and *United States v. Hawes*, 18 U.S.C.M.A. 464, 40 C.M.R. 176 (1969), where lack of prejudice was apparently gleaned by the appellate court from the record as a whole rather than from evidence proffered by the Government.

RECENT DEVELOPMENTS

as is accountable to the defense. A defense delay is tantamount to waiver.

It must be remembered, finally, that because there is a presumption of a denial of speedy trial it does not mean that the defense must sit mute. It may still submit whatever evidence of actual prejudice, oppressive design, or other unreasonable factors it feels may strengthen its case.

IV. CONCLUSION

Both *Hubbard* and *Burton* could have profound effects on the law of speedy trial in the military. If the proposition that prejudice to the accused is no longer an element of a speedy trial violation is allowed to stand, a failure to show reasonable diligence by the Government should in itself be enough to warrant sustaining a motion to dismiss for lack of speedy trial. And, regardless of the fate of *Hubbard*, *Burton* should make the job of the Government, particularly after three months' confinement or after a motion by the defense for prompt disposition of the charges, more difficult. Only time will tell the weight the Court of Military Appeals will give to the various burdens of proof which *Burton* has thrust into the area of speedy trial. In this regard it must be remembered that *Burton* only applies to offenses which arise after the date of the decision. Given the normal time lapse in the appellate process, it should be some time before decisions involving alleged *Burton* violations are reported. In the meantime counsel might, while testing the *Burton* guidelines at the trial level, be wise to keep an eye on the fate of the progeny of the *Hubbard* decision.

CAPTAIN WILLIAM S. HOPSON, IV**

*Environmental Responsibility for the
Military: Citizens for Reid State Park v. Laird,*
USDC Maine, 21 January 1972*

I.

In the past decade the military commander, by force of tradition something of a renaissance man already, has taken on the roles of race relations counselor, First Amendment student, and

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narcotics expert. Now federal law and an expanding public conscience are forcing him to take on a new role as environmental protector. One aspect of that duty was recently considered by the United States District Court for the District of Maine in *Citizens for Reid State Park v. Laird*.

At issue in the case was the Navy's responsibility under the National Environmental Policy Act of 1969¹ (NEPA) for a mock amphibious landing and cold weather training exercise at Maine's Reid State Park. Plaintiffs were private citizens and a private unincorporated association seeking to enjoin the designated "Operation Snowy Beach" because of an alleged serious threat to the park's ecology.

It was conceded by all parties that the NEPA and its implementing regulations² required the Navy to evaluate the possible environmental consequences of the Snowy Beach landing. It was further undisputed that if the landing fell within a vaguely defined category of "major Federal actions significantly affecting the quality of the human environment,"³ the Navy was required to submit a formal written statement detailing the impact on the environment of the Snowy Beach operation. A major point of contention in court was the Navy's determination that no written impact statement was required.

II.

The court's opinion focused on three factors: (1) the scope of the Navy operation; (2) the possible damage to the park's environment; and (3) the Navy's efforts to seek alternatives to the damage. The Reid State Park segment of Operation Snowy Beach involved the landing of approximately 900 marines and a subsequent three or four-day bivouac for cold weather training exercises.⁴ Reid State Park consists of approximately 800 acres of sand beach, sand dunes, salt marshes and wooded uplands. Several roadways run across the park. In summer time all areas are open to the public with maximum daily visitation at about 6,000 persons. In January, the time of the planned amphibious invasion, the park was essentially closed to the public.

¹ 42 U.S.C. § 4331 *et seq.* (1970).

² See, e.g., Department of Defense Directive 6050.1 (9 Aug. 1971) [hereafter cited as DOD Dir.].

³ 42 U.S.C. 4332(2) (C) (1970).

⁴ According to Navy plans and dependent on the weather, landings were to be on the beach, inland by helicopter or in both places. The men would sleep in pup tents at the bivouac area and subsist on either C rations or hot meals flown in by helicopter. Training exercises would be limited to the park roads and wooded areas away from the beach.

RECENT DEVELOPMENTS

The court tacitly recognized the possibility of damage to Reid Park from a military operation that took no account of ecological considerations.⁵ However, the record indicated considerable advance planning between the Department of the Navy and appropriate State of Maine officials. Most pertinently an agreement between the Maine State Park and Recreation Commission and the Navy agreed to avoid many of the more hazardous uses of the park.⁶ The Navy also offered evidence that Reid State Park was the only eastern seaboard area "appropriate for a realistic cold-weather landing and training exercise."⁷

Relying on the agreement the court found that "the only potential environmental damage, either ecological or aesthetic,"⁸ involved possible loosening of the ground cover in wooded upland areas and some blowing out of dune grass by helicopters flying too low over a dune. Based on this evidence the court found the plaintiffs had failed to show that the Navy was engaging in a "major federal action significantly affecting the quality of the human environment." Therefore, no written impact statement was required under the NEPA. Further, the plaintiffs failed to show that the Navy had not complied with more informal NEPA requirements⁹ to consider the environmental effects of Operation Snowy Beach.

III.

In its brief history the National Environment Policy Act of 1969 has amply justified its sponsors' assumptions concerning the

⁵ *Citizens for Reid State Park v. Laird*, Civil No. 13-18, (D. Maine, 21 Jan. 1972) at 12-13.

⁶ The permit and subsequent agreement between the Navy and the Maine Park Commission conditioned the exercise as follows: "(1) All motor vehicles will be restricted to existing roadways; (2) with the exception of the designated landing and embarkation areas at Todd's Point, and if necessary at Griffith Head, the beaches, the sand dunes, and the salt marshes will not be used by vehicles, helicopters or personnel; (3) helicopters will land only in designated landing areas at the Todd's Point and Griffith Head parking lots, in the field at the park entrance and in the field near the center of the park; (4) helicopters will descend and ascend vertically; (5) portable chemical toilets will be used by all personnel; (6) no trees will be cut; (7) no live ammunition will be used; (8) there will be no littering of the park area, which is to be left in the same condition, as near as possible, as it is at the commencement of the exercise." *Id.* at 6.

⁷ *Id.* at 13.

⁸ *Id.* at 6. The court subsequently noted the Navy's conclusion that the "only unavoidable short-term adverse effect" would be minor increases in local noise, human waste and sewerage. *Id.* at 13.

⁹ The plaintiffs contended that the Navy had not complied with sections 102(1), 102(2) (A), (B), (D), of NEPA (42 U.S.C. § 4331 and 32) in addition to their specific failure to file an impact statement under section 102(2) (C). The sections require:

57 MILITARY LAW REVIEW

state of our environment.¹⁰ A wealth of cases, typically challenging the failure to provide an adequate environmental impact statement, have been litigated in the last two years. The Navy in the Snowy Beach case, therefore, joined a long list of federal agency-defendants challenged under the NEPA.

The pertinent part of the NEPA mixes 4th of July rhetoric with hard procedural responsibilities. Section 101 declares it "the continuing policy of the Federal Government" to promote conditions under which "man and nature can exist in productive harmony."¹¹ To this end and consistent "with other essential considerations of national policy" federal government efforts are to be devoted to assuring a quality environment. Specificity begins with section 102. "To the fullest extent possible" the earlier stated environmental considerations shall be reflected in the policies, regulations, and public laws of the nation.¹² Subsection 2 requires "all agencies" of the federal government to ensure that environmental factors are considered in agency decision-making. The most specific requirement is subsection 2C, the impact statement requirement. An environmental impact statement is to be included in (1) every legislative recommendation or report and (2) every "other major Federal actions significantly affecting the quality of the human environment."¹³ The impact statement shall discuss

Sec 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

* * *

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

¹⁰ The legislative history of the NEPA observes "There may be controversy over how close to the brink we stand, that there is none that we are in serious trouble." 91st Cong., 1st Sess. (1969), 2 U. S. CODE CONG. & ADMIN. NEWS 2751, 2754. Language in the Act itself speaks of the "profound impact of man's activities on the environment" and the "critical importance of restoring and maintaining environmental quality . . ." 42 U.S.C. § 4331(a) (1970).

¹¹ *Id.*

¹² *Id.* at § 4332.

¹³ *Id.* at § 4332(2) (C).

RECENT DEVELOPMENTS

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Procedurally, consultation is required with any federal agency having "jurisdiction by law or special expertise" regarding particular environmental impacts.¹⁴ Copies of the impact statement are to accompany the proposal through the federal agency's review process.¹⁵ The objective is to give the decision makers the environmental facts so that they may make intelligent choices.

Executive Order 11514 of 5 March 1970 commanded action by federal agencies to ensure compliance with the NEPA.¹⁶ One year later the Council on Environmental Quality¹⁷ authored guidelines in part considering the impact statement requirements.¹⁸ Specific guidance to the military was provided in the Department of Defense Directive 6050.1 of 9 August 1971.¹⁹

IV.

Section 102(2)(C) is a model of imprecision. What is a major federal action? What major federal actions significantly affect the quality of the human environment? How "detailed" is the impact statement to be? Who is the "responsible official" charged with preparing the report and to what extent can he delegate his duties? When NEPA sponsor Senator Henry Jackson called the decision-making procedure of the Act its "most important

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Exec. Order No. 11514, 35 Fed. Reg. 46, 4247 (1970).

¹⁷ The Council on Environmental Quality was created at the same time as the NEPA was passed. The Council was created to serve as a Presidential fact-finding and reporting body on environmental matters. 42 U.S.C. § 4341 *et. seq.* (1970).

¹⁸ 36 Fed. Reg. 79, 7724 (1971).

¹⁹ For particular service implementation *see* Adjutant General, Department of the Army, letter, "Environmental Considerations in DA Actions," RCS DD-H&E(AR) 1068, 21 October 1971; OPNAV Instruction 6240.2B (10 Nov. 1971).

feature . . . and probably the least recognized"²⁰ he should have added, most susceptible to court and administrative interpretation, as well. Clearly one possible interpretation would have been to treat NEPA as a congressional pep talk devoid of any enforceable content.²¹

While much remains undecided after two years of NEPA litigation the Act has clearly not been a nullity. All sections of the country have seen federal projects enjoined for failure to comply with the NEPA standards.²² This is probably the most significant lesson to be drawn from the early court cases. Additional judicial language has indicated the following: (1) NEPA remains a procedural, not substantive, requirement. While federal decision makers must evaluate environmental consequences in making their decisions they are not required to reach the "environmentally correct" decision.²³ (2) While early decisions flatly rejected claims of retroactive application of NEPA,²⁴ subsequent cases indicate that the mere fact a project began before 1 January 1970 (the effective NEPA date) does not exempt its continuing consequences from the NEPA requirements.²⁵ (3) The presence of other federal statutes supposedly protecting the environment does not automatically excuse NEPA compliance.²⁶ (4) Not every

²⁰ Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073 (1970).

²¹ Some of the implications of this approach were considered and rejected in *Calvert Cliffs v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

²² *Id.*, and *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971), provide excellent discussions of many of the issues involved in NEPA litigation.

²³ See *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). But see language of Judge Wright in *Calvert Cliffs v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971). ("Thus the general substantive policy of the Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances.")

²⁴ *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970), *aff'd* 449 F.2d 1303 (3d Cir. 1971); *Brooks v. Volpe*, 319 F. Supp. 90 (W.D. Wash. 1970), and 329 F. Supp. 118 (W.D. Wash. 1971); *Elliot v. Volpe*, 328 F. Supp. 831 (D. Mass. 1971).

²⁵ *Calvert Cliffs v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971); *Nolop v. Volpe*, 333 F. Supp. 1364 (D. S.Dak. 1971); *Environmental Defense Fund v. TVA*, 3 Environmental Law Reporter Cases [hereafter cited as *ERC*] 1553 (E.D. Tenn. 11 Jan. 1972).

²⁶ See, e.g., *Calvert Cliffs v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Ely v. Velde*, 449 F.2d 1109 (4th Cir. 1971); *Izzak Walton League v. Schlesinger*, 3 ERC 1453 (D.D.C. 13 Dec. 1971); *Kalur v. Resor*, 3 ERC 1458 (D.D.C. 22 Dec. 1971). NEPA authority did yield to the supposed congressional mandate to the Price Commission for quick decisions in *Cohen v. Price Commission*, 40 U.S.L.W. 2471 (S.D.N.Y. 24 Jan. 1972).

RECENT DEVELOPMENTS

sheaf of papers designated an impact statement will satisfy the statutory command. Several impact statements, evidencing more than token statutory compliance, have been rejected by the courts.²⁷ (5) Liberal standing requirements and a narrow reading of federal immunity have reduced the opportunity for federal agencies to avoid the merits of impact statement challenges.²⁸

V.

Despite two years of regulation drafting and litigation, the contours of a "major federal action significantly affecting the quality of the human environment" remain uncertain. The Council on Environmental Quality Guidelines provide only limited help. The "overall, cumulative impact of the action" is to be considered.²⁹ Such actions may be localized in impact. Actions of any kind where the environmental impact "is likely to be highly controversial" also require impact statements.³⁰

More specific guidance is provided in the DOD Directive. The Directive surmises that the majority of DOD actions will fall in the "project and continuing activities" category.³¹ Actions in this latter category shall be evaluated and divided into actions (1) not significantly affecting the environment and (2) those that will. For the former, "any written assessment of the environ-

²⁷ *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971); *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971); *Natural Resources Defense Council v. Morton*, 3 ERC 1473 (D.D.C. 17 Dec. 1971); see also Justice Douglas' dissent in *Committee for Nuclear Responsibility v. Schlesinger*, 3 ERC 1276 (U.S. Sup. Ct. 6 Nov. 1971).

²⁸ *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971); *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970) (action seeking interpretation of Rivers and Harbors Act, 33 U.S.C. 401 et seq. (1970)); *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971) (injunctive relief against construction of cross-Florida barge canal); *West Virginia Highlands Conservancy v. Island Creek Coal Company*, 441 F.2d 232 (4th Cir. 1971); *Cape May County Chapter v. Macchia*, 329 F. Supp. 504 (D. N.J. 1971); *Kalur v. Resor*, 3 ERC 1458 (D.D.C. 22 Dec. 1971). An oddity in the area is *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971). There plaintiff sought to enjoin the Army's Rocky Mountain Arsenal from the storage of chemical and biological agents. The court applied sovereign immunity and found no NEPA application. The combination of a need for military secrecy and the failure to clearly define a new federal action may account for the outcome of the case. The recent Supreme Court decision in *Sierra Club v. Morton*, 40 U.S.L.W. 4397 (19 April 1972) provides some narrowing of the standing requirement but should not prove a serious obstacle to future environmental challenges.

²⁹ Section 5(b).

³⁰ *Id.*

³¹ DOD Dir. (Enclosure 1) IV C 1.

mental aspects" shall be retained by the assessing authority.³² No formal impact statement, however, is required. With limited exceptions³³ all actions significantly affecting the environment require a full-dress impact statement.³⁴

A separate attachment to the DOD Directive further evaluates the major actions significantly affecting the quality of the human environment (MASAQHE).³⁵ After unoptimistically noting that it is "impossible to list categorically" all Department of Defense MASAQHE's the attachment covers much the same ground as the CEQ guidelines.³⁶ It hypothesizes an "extremely noisy activity conducted . . . near a residential area"³⁷ as a localized MASAQHE. A number of actions are listed as requiring "close environmental scrutiny" because of their environmental effect.³⁸ While not all may be MASAQHE's (requiring a full impact statement) "consideration" shall be given to a written assessment of environmental impact. Included on the list are: development of new weapons or vehicles, real estate acquisitions, construction projects, new installations, disposition of biological or chemical weapons, mission changes threatening to over-populate an area and (in a potentially giant catch-all) any action liable to cause controversy among the affected population.³⁹ Any action which "becomes highly controversial" is to be covered in an impact statement regardless of its status as a MASAQHE.⁴⁰ A rather brief section notes some of the environmental factors to be considered.⁴¹ These include the increase in chemicals or solid waste in water; the significant alteration of water temperature; the emission of toxic substances into the atmosphere; the creation of excessive noise; the destruction of vegetation, wildlife, or marine life; the effect on soil quality; the effect on the health, welfare and aesthetic enjoyment of man; and the effect on other forms of life or eco-systems of which they are a part. A second inclosure details the preparation and processing of impact statements.⁴² In general, three points can be made: (1) The initial responsibility for many statements rests at the post commander level.

³² *Id.* at IV C 2a.

³³ The exceptions generally refer to projects for which a statement has been previously prepared and to combat or emergency activities.

³⁴ DOD Dir, IV C 2b.

³⁵ *Id.* at Attachment 1.

³⁶ *Id.* at A, B.

³⁷ *Id.* at B 2.

³⁸ *Id.* at D.

³⁹ *Id.*

⁴⁰ *Id.* at E.

⁴¹ *Id.* at C.

⁴² *Id.* at Enclosure 2.

RECENT DEVELOPMENTS

(2) Both legal and scientific help is available for the commanding officer and his staff who don't know what an eco-system is, let alone how to protect it. (3) A final impact statement is expected to be a thorough evaluation of both favorable and unfavorable aspects of the project.⁴³ Throughout, the judge advocate officer has a major role to play.⁴⁴

VI.

The federal courts have tended to approach "major federal actions significantly affecting the environment" as Justice Stewart approaches hard core pornography—knowing it when he sees it. Typically, this issue has not featured prominently in litigation. Assuming NEPA has any meaning, it seems difficult to suggest that giant nuclear power plants,⁴⁵ major Corps of Engineers waterway projects⁴⁶ and interstate highway constructions (often through urban areas)⁴⁷ are not major federal actions and do not significantly affect the environment. In a number of less frequently litigated environmental situations there have also been tacit admissions of major federal impact.⁴⁸

⁴³ *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971); *Natural Resources Defense Council v. Morton*, 3 ERC 1473 (D.D.C. 17 Dec. 1971); *Environmental Defense Fund v. TVA*, 3 ERC 1553 (E.D. Tenn. 11 Jan. 1972).

⁴⁴ While particularly referring to local and state requirements the 10 January 1972 letter from the Office of the Deputy Chief of Staff for Logistics, subject: Environmental Protection and Preservation, emphasizes the need for judge advocate representation in environmental decisions.

⁴⁵ *Calvert Cliffs v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). *Izzak Walton League v. Schlesinger*, 3 ERC 1453 (D.D.C. 18 Dec. 1971).

⁴⁶ *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971); *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971) (cross-Florida barge canal); *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971) (Tennessee-Tombigbee barge canal); *Environmental Defense Fund v. TVA*, 3 ERC 1553 (E.D. Tenn. 11 Jan. 1972) (Tellico project on Little Tennessee River).

⁴⁷ *Nolop v. Volpe*, 333 F. Supp. 1364 (D. S.Dak. 1971); *Morningside-Lenox Park Association v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971); *Lathan v. Volpe*, 3 ERC 1862 (9th Cir. 15 Nov. 1971).

⁴⁸ Among the situations have been right-of-way requests in connection with the trans-Alaska oil pipe line, *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970); a Department of Agriculture Chemical Program for the Control of the Fireant, *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401 (D.D.C. 1971) (court found sufficient compliance with NEPA); the termination of federal helium purchase, *National Helium Corporation v. Morton*, F.2d (10th Cir. 1971); mining and timber cutting activities within a national forest area, *West Virginia Highlands Conservancy v. Island Creek Coal Company*, 441 F.2d 232 (4th Cir. 1971); construction of 33.5 miles of two-lane roadway in a federal area, *Upper Pecos Association v. Stans*, —F.2d—(1971); the granting of oil and gas leases on the Louisiana Conti-

Two cases, reaching opposite results, did specifically discuss the contours of major federal actions significantly affecting the quality of the human environment. At issue in *Conservation Society v. Texas*⁴⁹ was an eighteen million dollar interstate highway segment through a San Antonio park. The failure to file an impact statement by the Federal Department of Transportation was defended on the ground that a section of Texas roadway was not a major federal action. It was also argued that the State of Texas might now be willing to totally fund the project. The Fifth Circuit rejected both arguments. They found the nine million dollar federal contribution to clearly indicate the presence of a major federal action. The court further found the long involvement of federal funds and planning in the highway project forbade a state take-over to avoid NEPA requirements.⁵⁰

A second dispute over a major federal action went against plaintiffs in *Davis v. Morton*.⁵¹ A New Mexico Indian Pueblo sought to lease 1300 acres of its land for private residential, commercial and recreational development. Under federal statute, approval by the Secretary of the Interior was required. The Secretary's failure to prepare an impact statement prior to granting approval was challenged by plaintiffs. The government conceded the development project significantly affected the quality of the environment. They denied, however, that a major federal action was involved where the only federal interest in the lease was as a statutory guardian of the Indian tribe. A New Mexico district court was persuaded that no major federal action was involved and denied injunctive relief to the plaintiffs.

VII.

The *Reid State Park* case offers another court's perspective on major federal actions significantly affecting the human environ-

mental Shelf, *Natural Resources Defense Council v. Morton*, 3 ERC 1473 (D.D.C. 17 Dec. 1971); construction of a sewage disposal plant, *Gibson v. Ruckelshaus*, 3 ERC 1028 (E.D. Tex. 1 Mar. 1971); construction of an HUD assisted high-rise apartment, *Goose Hollow Foothills League v. Romney*, 3 ERC 1457 (D.C. Ore. 8 Dec. 1971), but see *Echo Park Residents v. Romney*, 3 ERC 1255 (C.D. Cal. 11 May 1971); and a request to the ICC to abandon a railroad line in New York City, *New York City v. United States*, 40 U.S.L.W. 2475 (E.D. N.Y. 20 Jan. 1972).

⁴⁹ 2 ERC 1872 (5th Cir. 1971).

⁵⁰ With limited discussion of the "major federal action" requirement, the 4th Circuit found that a \$775,000 Law Enforcement Assistance Administration grant to aid in the construction of a Virginia prison facility would require an impact statement. This was so despite LEAA's apparent lack of control over the location of the correctional facility. *Ely v. Velde*, 40 U.S.L.W. 2275 (4th Cir. 11/8/71).

⁵¹ 3 ERC 1546 (D. N.M. 21 Dec. 1971).

RECENT DEVELOPMENTS

ment. What seems most significant is not the size or duration of the military maneuver but rather the Navy's effort to minimize harmful environmental consequences. Very likely absent the agreement with the State Park Commission, the court may have accepted plaintiffs' contention that irreparable harm to the park would result. With the agreement, however, the court probably felt that the purpose of an impact statement had largely been satisfied. The major potential environmental damages were identified and either avoided or minimized. Both the Navy planners and the operation participants were alerted to the environmental dangers involved. In brief, to the court's eyes, the Navy's advance planning removed the element of significant effect to the quality of the human environment and thus obviated the need for an impact statement.⁵³

At least two aspects of the *Reid State Park* decision are unclear. First, the court's opinion is strangely inconclusive regarding the "controversial" nature of the operation. The court states the DOD Directive's mandate that impact statements be prepared for actions that are "highly controversial with regard to environmental impact."⁵⁴ Then the matter is dropped. What led the court to believe the Navy was not faced with a *highly controversial* environmental issue regardless of its lack of *significant* environmental effect? The CEQ guidelines and the DOD Directive appear to recognize that a highly controversial project should be given the highest environmental review (a full written impact statement) despite an agency's conclusion that it is not a major federal action or does not significantly affect the environment. This attitude may be premised on three factors: (1) general agency caution; (2) an appreciation that an agency's decision as to lack of significant environmental effect may be wrong; and (3) a desire to avoid seemingly arbitrary rejection of citizen claims, often, in itself, a factor stirring further controversy. Given the existence of a federal court lawsuit and national press

⁵³ A retrospective look at the Snowy Beach Operation suggested that the operation had gone generally according to plan. A letter from the Superintendent of State Parks, Mr. Thomas Dickens, to the Navy's chief negotiator, Mr. Joseph Madden, of the Boston Branch, Naval Facilities Engineering Command, noted the operation went "pretty much the way that it was envisioned this past summer." There was "a certain amount of rubbish and litter" but "no permanent damage." "[I]f we were to go through this again . . . our agreement would be more explicit in some ways. . . ." The specific reference was to the uncertainty over the use of the marsh area. Letter of 1 February 1972.

⁵⁴ *Citizens for Reid State Park v. Laird* (D. Maine, Civ. No. 13-18, 21 Jan. 1972) at 10.

publicity what further was needed to make the Snowy Beach landing "highly controversial"?

A second matter left unclear is the extent to which decisional alternatives must be considered. In *Reid State Park* the Navy was successful in convincing the court that no practical alternative to the state park site was available. No doubt the limited environmental damage anticipated, aided the court in reaching a "no practicable alternative" finding. In any event, little discussion of the alternatives takes place in the opinion.

Other federal proposals may not receive such easy blessing. Take as a hypothetical the construction of a new military confinement facility at Fort X. What alternatives should reasonably be explored by the post commander and other Army planners? Cancelling the project altogether would always appear an alternative.⁴⁴ So, too, the possibilities of better utilizing or expanding present facilities should be assessed. Assuming that a new facility is still favored, consideration should be given to its location at Fort Y or Z where the environmental effects of new construction may be less significant. Once alternatives to the site have been assessed, construction and operation alternatives at the chosen site should also be considered. To many persons these might seem to exhaust the reasonable alternatives. However, is there a requirement to go a step further and assess the underlying need for change? Thus in our hypothetical should the post commander be asked to reassess his entire confinement policy in order to obviate the need for a new facility? To date the courts have not been clear as to the extent of the alternatives to be considered.

VIII.

This note will hopefully serve as an introduction to the NEPA and the "major federal action" question for the military lawyer. Further statutory revision and judicial interpretation may clarify the military's responsibility for environmental quality. However, the lack of clarity should not encourage inaction. Despite complaints about its potential for retarding progress⁴⁵ the NEPA has clearly struck a responsive chord among citizens and the federal judiciary. Conformance with the act by the military should be a matter of deep commitment to the environmental

⁴⁴ See, e.g., *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, 761 (E.D. Ark. 1971).

⁴⁵ See, e.g., *Washington Post*, 26 March 1972, at E-1 reporting Interior Secretary Morton's displeasure with environmental decisions that he argues have hampered national energy programs.

RECENT DEVELOPMENTS

values of America rather than a grudging compliance with federal regulations. The Reid State Park operation suggests the dividends that can be paid by some regard for environmental planning. Hopefully, future military endeavors will improve upon this record.

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Kaufman, drawing on experience gained as consultant for Senator Frank Lautenberg's Joint Economic Committee, points to the 1966 presentation of the C-130, the Chinook Helicopter and the M-16, among others, as proof that "The contract system has failed." Kaufman suggests that the underlying cause of this failure is the close relationship between the military and the government contracting community. The dangers, real and imagined, of the "Military Industrial Complex" have been demonstrated again by many individuals familiar with DOD procurement procedures. Few have suggested realistic means to eliminate the danger. Kaufman's solution to this problem might seem to be a small defense budget. Without money there would be no incentive for contractors to improve defense facilities as they would not benefit from them. Further, the defense facilities industry would be forced to make more rational choices regarding expansion and contraction.

There can be little doubt that a smaller armed defense budget would be a step in the right direction.

Frank Lautenberg's Committee on the Military-Industrial Complex and the Arms Race is currently studying this problem.

The Department of Defense System (Joint Military Community) and the Department of Defense (JMD) are currently studying this problem.

U. S. Senator, The Joint Military Community (JMD) is currently studying this problem.

These dangers will not be solved by the Federal Government in the current system. Only a radical change in the way the problem is handled can solve the problem. The Military-Industrial Complex (MID) is currently studying this problem.

Some of the solutions which have been suggested are based on the fact that the military is currently studying this problem.

It is the author's opinion that there are solutions of the problem which would also have other benefits. These solutions are currently being studied.

BOOK REVIEWS

The War Profiteers, Richard Kaufman,
Doubleday & Co., 1972

Criticism of the Government's system of acquiring major weaponry is nothing new. It is seen in professional journals,¹ reports of Congressional hearings,² and even in the Sunday newspaper.³ With each critical treatise there is some hope that workable solutions to the problems of weapons acquisitions will be offered. This hope is not realized in Richard Kauffman's book, *The War Profiteers*.

Kauffman, drawing on experience gained as economist for Senator Proxmire's Joint Economic Committee, points to the ill-fated procurements of the C-5A, the Cheyenne Helicopter and the M-16, among others, to prove that "[T]he contract system has failed." ⁴ Kauffman suggests that the underlying cause of this failure is the close relationship between the military and the government contracting communities. The dangers, real and imagined, of the "Military-Industrial Complex" have been elaborated upon by many individuals familiar with DOD procurement processes ⁵ yet few have suggested realistic means to minimize the dangers. ⁶ Kauffman's solution to this problem would seem to be a small defense budget. ⁷ Without money there would be no incentive for contractors to influence defence decisions as they would not benefit from them. Further the defense decision makers would be forced to make more rational choices regarding weaponry to be procured.

There can be little doubt that a severely limited defense budget

¹ Nash, *Weapons Systems Acquisition in the 1970's—New Policy and Strategy*, 5 NCMA JOURNAL 15 (1971).

² *The Acquisition of Weapons Systems* (Joint Economic Committee,) 92d Cong., 1st Sess. (1971).

³ Proxmire, *The U.S. Navy Fighter Jet That Shot Itself Down and Other Pentagon Lemons*, The Washington Post Potomac Magazine, 5 Dec. 1971, p. 11.

⁴ R. KAUFFMAN, *THE WAR PROFITEERS* 268 (1971) [hereafter cited as KAUFFMAN].

⁵ These dangers were first pointed out by President Eisenhower in his farewell address. John Kenneth Galbraith has dealt with this problem in *How to Control The Military*, HARPER'S MAGAZINE (June, 1970). Galbraith views the problem as broader than Military-Industrial pervading all of modern society. See J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967).

⁶ Some of the solutions which have been proposed are found in the final chapter of KAUFFMAN at 269-282. Kauffman, himself, dismisses many of these as being unworkable or impractical.

⁷ *Id.*, at 282-289. Kauffman suggests that there are reforms of the system which must also take place but that their success is totally dependent upon a small defense budget.

would affect contractors and their relationship with DOD, but would it not raise more problems that it solves? There is an obvious problem in arbitrarily limiting defensive capability. While in prior confrontations the U.S. has been able to move from a small defense budget to a large one and has been able to mobilize an effective force, the sophistication of current weaponry may preclude that possibility in future wars.⁸ Rather than eliminating the contract system, it would seem the better solution would be to reform the system.

Kauffman's solution would not be totally effective in resolving the problems found by him to exist in the system. His first objection is to the "excessive profits" being made by defense contractors. While his conclusions regarding profit are not supported by the most recently available data,⁹ a reduced defense budget would not, in and of itself, eliminate the evil. Kauffman suggests that hidden profits are being made in the allocation of costs, use of government equipment and progress payments. If this is as serious a problem as he suggests, then measures should be taken to control the costs and the government assistance. Similarly, if profits are too high, then they should be controlled by changing the Renegotiation Act or by enacting an excess profit tax. A limited defense budget, without correction of the defects alleged to exist, would merely mean that fewer contractors can make excessive profits.

Kauffman also feels that the high number of negotiated contracts indicates a lack of competition which is the direct result of the limited number of available firms in a particular area. It is apparent from Kauffman's book that he may not fully understand negotiated procurement¹⁰ and his solutions may actually increase the government's problems. It would seem obvious that what is needed here is more firms with a capability to compete. A reduced defense budget, even with additional controls limiting

⁸ One of the critical problems with today's sophisticated technology is the long lead time necessary to develop a weapon. See PECK & SCHERER, *THE WEAPONS ACQUISITION PROCESS—AN ECONOMIC ANALYSIS*, 53-54, (1962).

⁹ A recent study conducted by the General Accounting Office at the direction of Congress concludes that "Profit before Federal Income taxes, on defense work, measured as a percentage of sales, was significantly lower than on comparable commercial work for 74 large DOD contractors." GAO Defense Industry Profit Study, B-159896, March 17, 1971, at P. 1. The GAO concluded that profit considered as a percentage of equity capital was about the same as under commercial contracts. The GAO study substantiates an earlier study conducted for the Department of Defense by the Logistics Management Institute.

¹⁰ Compare KAUFFMAN's explanation of a "typical" negotiated contract at 124 & 125 with the explanation in the Armed Services Procurement Regulations of the cost incentive contract at § 3.405-4.

noncompetitive situations, could have the effect of reducing the number of willing competitors. With a reduced budget the potential gain for any one firm would be minimized and they may be forced into the commercial market rather than invest substantial amounts of talent and money into a business with a barrier on potential gain.¹¹ Increased competition may be encouraged if additional sums were added to the defense budget and DOD agencies could afford to fund parallel development and second sourcing.¹² This would encourage competition on the production contracts where the effects of a "buy-in" are most felt. Kauffman's view seems to be that the only satisfactory type of competition is that obtained from formal advertising. Such competition is often not possible in major systems procurement where realistic cost estimates are not possible at the early stages of procurement.¹³

Kauffman gives little guidance to the decision-makers on how to make the difficult decision to develop a particular weapon. While other authors have made constructive efforts in devising a workable decision theory for weapons acquisition,¹⁴ Kauffman leaves that most difficult decision to the reader when he states, "How small [a budget] is an intellectual problem that citizens must solve."¹⁵ The important question of how to make that determination is left unresolved.

RICHARD W. MAAG*

Computers & the Law, Robert Bigelow,
American Bar Association, 1971

The American Bar Association's Standing Committee on Law and Technology, the successor of the former committees on

"Admittedly some firms would remain in the defense industry. A recent study conducted for NASA shows that a key reason for some firm's entry into the defense market is the fact that the Government is the only customer for the goods that they produce. See Cirone, *Extra-Contractual Influences in Government Contracting*, 5 NCMA JOURNAL 53, 56-57 (1971). This study would suggest that the only firms remaining in as viable competitors in a small defense budget environment would be the very inefficient competitors that Kauffman seeks to avoid.

*See GAO Report to the Congress, *Evaluation of Two Proposed Methods for Enhancing Competition in Weapons Systems Procurement*, B-39995, 14 July 1969.

*Id. at 34.

*See PECK & SCHERER, *supra* note 8 and HITCH & MCKEAN, *THE ECONOMICS OF DEFENSE IN THE NUCLEAR AGE* (1960). An interesting discussion of the practical difficulties in making weapons acquisition decisions is found in ART, *THE TFX DECISION—MCNAMARA AND THE MILITARY*, (1968).

*KAUFFMAN at 289.

*Member, State Bar of California. Former Instructor, Procurement Law Division, Judge Advocate General's School.

Communications and on Electronic Data Retrieval, sponsored the second edition of this introductory handbook. The purpose of this publication is to introduce to the legal profession the state of the art in the use of computer oriented automatic data processing systems by attorneys. It is imperative that lawyers objectively face the unique aspects of this highly developed technology in order to function efficiently in this complex computerized society.

In order that the law remain abreast of twentieth century computer technological developments and able to respond to the needs of the citizen, it is essential that the lawyer be knowledgeable of the basic concepts of automatic data processing. Chapter I, Sections 3 and 4, presents a not too technical capsule version of the basic principles of electronic data processing and an overview of the equipment likely to be of interest to attorneys for their own use as well as their clients' use. The remainder of Chapter I, *Introduction to Machine Methods*, is too detailed an attempt to introduce the practitioner to manually operated machine devices, machines to create typed documents, image storage systems, and management information systems.

However, Chapter II, *The Computer in the Practice of Law*, vividly illustrates the work that has been done with computers in the area of law office practice in an effort to suggest improvements in office techniques. John F. Harty, Jr., predicts the commonplace use of computers for law office research of legal precedents, internal files, and files of large litigated matters, within the next five years if certain cost and education problems can be overcome. Paul S. Hoffman in Section 2, Chapter II, presents an excellent checklist covering some of the objective measures that may help the attorney effectively evaluate legal research services. The remainder of Chapter II illustrates electronic data processing as an aid to trial lawyers, estate planners, and tax attorneys, leaving it to the ingenuity of counsel to determine other areas of effective computer utilization.

Because the federal and state governments have been in the forefront in adapting computers for management purposes, it is fitting that Chapter III considers primarily how the government uses the computer in court administration, legislative redistricting, tax administration, and law enforcement. Serious questions from a regulatory point of view are raised and the possibilities of regulation are considered.

Many of the questions raised in Chapter III are discussed from the user's point of view in Chapter IV, *the Lawyer and His Client's Computer*. This Chapter considers some of the areas

in which a lawyer's client may encounter difficulties because he does, or does not have a computer. Included are economic considerations, contracts for the purchase, lease, or maintenance of computer systems, insurance risks, and tax considerations. Section 6, Chapter IV raises many interesting questions concerning the admissibility of computer generated evidence, and techniques of proof because computer systems involve nontraditional records.

In Chapter V, *Jurimetrics*, the author suggests an analysis of law and predictions of litigated cases by the application of advanced mathematical techniques and logic to law. The consideration of how these techniques can help the practicing lawyer is too technical for the average lawyer. But through this deficiency, the legal profession must be alerted to the need for new training to enable tomorrow's lawyers to cope with tomorrow's legal problems.

ROBERT N. JOHNSON*

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in which a lawyer's efforts may encounter difficulties because he does or does not have a comprehensive and economic knowledge of the law. The author's comments on the importance of the lawyer's knowledge of the law are well stated and are a commendable contribution to the literature. The author's comments on the importance of the lawyer's knowledge of the law are well stated and are a commendable contribution to the literature.

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2. Lansdale, Edward, *In the Midst of Wars*, Harper and Row, New York, 1972, 386 pp.
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*Mention of a work in this section does not preclude later review in the *Military Law Review*.

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*Attention of a reader in this section may not indicate that review in the Washington Review.

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